

89-563

No. 89-

Supreme Court, U.S.

FILED

OCT 6 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

VIEUX CARRE PROPERTY OWNERS, RESIDENTS
& ASSOCIATES, INC.,

Petitioner,

v.

COLONEL LLOYD KENT BROWN, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JOHN H. BEISNER

Counsel of Record

BARBARA L. STRACK

STUART L. FULLERTON

O'MELVENY & MYERS

555 13th Street, N.W.

Washington, D.C. 20004-1109

(202) 383-5300

JAMES G. DERBES

DERBES & WALDRUP

610 Poydras Street

Suite 318

New Orleans, LA 70130

(504) 525-9538

JAMES R. LOGAN IV

650 Poydras Street

2850 Poydras Center

New Orleans, LA 70130

(504) 524-7604

Counsel for Petitioner



QUESTION PRESENTED

Relying on *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), the United States Court of Appeals for the Fifth Circuit has disregarded the concededly "literal construction" of a federal statute in favor of a contrary interpretation with purportedly "great practical appeal." The resulting question presented by the decision below is:

Does section 470f of the National Historic Preservation Act, 16 U.S.C. § 470f (1982), which requires federal agencies to consider the effect of "any" federally licensed activities on historic properties, apply to all federally licensed activities?

PARTIES TO THE PROCEEDING

Petitioner is Vieux Carre Property Owners, Residents & Associates, Inc., the plaintiff below.* Respondents are Colonel Lloyd Kent Brown, District Engineer, New Orleans District, United States Army Corps of Engineers; the City of New Orleans; the Audubon Park Commission; the Board of Commissioners of the Port of New Orleans; and the Board of Commissioners of the Orleans Levee District. The National Trust for Historic Preservation in the United States, the Louisiana Council for the Vieux Carre, and Patricia B. Rittiner appeared as *amicus curiae* in support of the plaintiff below.

* As required by Rule 28.1 of this Court, petitioner states that it has no parent companies, subsidiaries, or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS OF APPENDIX	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND FEDERAL REGULATIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	6
I. THIS COURT'S INTERVENTION IS NECESSARY TO RESOLVE A THREE-WAY DIVISION OF THE CIRCUITS WHICH COULD THWART CONGRESSIONALLY MANDATED EFFORTS TO PROTECT HISTORIC PROPERTIES	6
II. THE DECISION BELOW SANCTIONS JUDICIAL REJECTION OF UNAMBIGUOUS STATUTORY LANGUAGE IN FAVOR OF INTERPRETATIONS WITH "GREAT[ER] PRACTICAL APPEAL"	11
CONCLUSION	16

TABLE OF CONTENTS OF APPENDIX

	Page
Opinion of the United States Court of Appeals for the Fifth Circuit in <i>Vieux Carre Property Owners, Residents & Associates, Inc. v. Colonel Lloyd Kent Brown, et al.</i> , 875 F.2d 453 (5th Cir. 1989)	1a
Order of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing and Suggestion for Rehearing En Banc, No. 87-3854 (5th Cir. July 12, 1989)	28a
Order and Reasons of the United States District Court for the Eastern District of Louisiana in <i>Vieux Carre Property Owners v. Col. Lloyd Kent Brown</i> , No. 87-3700 (E.D. La. 1987)	30a
Statutes and Federal Regulations Involved	37a

TABLE OF AUTHORITIES

CASES:	Page
<i>Ashley, Drew & N. Ry. Co. v. United Transp. Union</i> , 625 F.2d 1357 (8th Cir. 1980)	13
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	7, 11
<i>Church of the Holy Trinity v. United States</i> , 143 U.S. 457 (1892)	5, 11, 15
<i>Ciampa v. Secretary of Health & Human Serv.</i> , 687 F.2d 518 (1st Cir. 1982)	12
<i>Crooks v. Harrelson</i> , 282 U.S. 55 (1930)	11
<i>Ernst & Ernst v. Hochfelder</i> , 425 U.S. 185 (1976) ..	14
<i>Friends of the Earth v. Consolidated Rail Corp.</i> , 768 F.2d 57 (2d Cir. 1985)	12
<i>Garcia v. United States</i> , 469 U.S. 70 (1984)	11
<i>Henry T. Patterson Trust by Reeves Banking & Trust Co. v. United States</i> , 729 F.2d 1089 (6th Cir. 1984)	12
<i>Howe v. Smith</i> , 452 U.S. 473 (1981)	11
<i>In re Forfeiture Hearing as to Caplin & Drysdale</i> , 837 F.2d 637 (4th Cir. 1988)	12
<i>In re Sinclair</i> , 870 F.2d 1340 (7th Cir. 1989)	12
<i>National Center for Preservation Law v. Landrieu</i> , 496 F. Supp. 716 (D.S.C.), <i>aff'd</i> , 635 F.2d 324 (4th Cir. 1980) (per curiam)	7
<i>National Freight, Inc. v. Larson</i> , 760 F.2d 449 (3d Cir. 1985)	12
<i>Oklahoma ex rel. Dep't of Human Serv. v. Weinberger</i> , 741 F.2d 290 (10th Cir. 1983)	12
<i>Ringsred v. City of Duluth</i> , 828 F.2d 1305 (8th Cir. 1987)	8-9
<i>Riverside Irrigation Dist. v. Andrews</i> , 758 F.2d 508 (10th Cir. 1985)	8, 9, 13
<i>Smith v. Bowen</i> , 815 F.2d 1152 (7th Cir. 1987)	13
<i>Trailer Train Co. v. State Bd. of Equalization</i> , 697 F.2d 860 (9th Cir.), <i>cert. denied</i> , 464 U.S. 846 (1983)	13
<i>United States v. Fountain</i> , 840 F.2d 509 (7th Cir.), <i>cert. denied</i> , 109 S. Ct. 533 (1988)	15

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Locke</i> , 471 U.S. 84 (1985)	15
<i>United States v. 162.20 Acres of Land, More or Less</i> , 639 F.2d 299 (5th Cir.), <i>cert. denied</i> , 454 U.S. 828 (1981)	7

STATUTES AND FEDERAL REGULATIONS:

Endangered Species Act, 16 U.S.C. § 1536 (1982) ..	8
National Historic Preservation Act,	
16 U.S.C. §§ 470 to 470w-6 (1982 & Supp. V 1987)	2
16 U.S.C. § 470(b) (3) (1982)	9
16 U.S.C. § 470(b) (4) (1982)	6
16 U.S.C. § 470a(a) (1982)	3
16 U.S.C. § 470f (1982)	<i>passim</i>
16 U.S.C. § 470h-2(d) (1982)	6, 7, 14
16 U.S.C. § 470h-2(f) (1982)	3, 6, 7
16 U.S.C. § 470i (1982)	4, 6, 7, 10
16 U.S.C. § 470j (1982)	10
16 U.S.C. § 470s (1982)	7
Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982)	4, 13
33 C.F.R.	
§ 330.1 (1988)	4, 13
§ 330.5 (1988)	8, 10
§ 330.5(a) (3) (1988)	10
36 C.F.R.	
§ 65.2(a) (1988)	3
§ 800.1(c) (2) (ii) (1988)	7
§ 800.2(o) (1988)	7, 14
§ 800.5(b) (1988)	8
§ 800.5(e) (1988)	8

LEGISLATIVE MATERIALS:

H.R. Rep. No. 1916, 89th Cong., 2d Sess. 7, <i>reprinted in 1966 U.S. Code Cong. & Admin. News</i> 3307	6
---	---

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 1457, 96th Cong., 2d Sess. 37, 45, <i>reprinted in</i> 1980 U.S. Code Cong. & Admin. News 6378	14
113 Cong. Rec. 25,942 (1966)	9
 <i>MISCELLANEOUS:</i>	
46 Fed. Reg. 43,892 (1981)	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

VIEUX CARRE PROPERTY OWNERS, RESIDENTS
& ASSOCIATES, INC.,

Petitioner,

v.

COLONEL LLOYD KENT BROWN, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner Vieux Carre Property Owners, Residents & Associates, Inc., hereby petitions this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 14, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 875 F.2d 453 (5th Cir. 1989), and is reprinted in the attached Appendix (1a).¹ The decision of the United States District Court for the

¹ Citations to material printed in the attached Appendix appear as "—a."

Eastern District of Louisiana is not reported and is also reprinted in the attached Appendix (30a).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on June 14, 1989. A timely petition for rehearing was denied on July 12, 1989 (28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES AND FEDERAL REGULATIONS INVOLVED

National Historic Preservation Act, 16 U.S.C. §§ 470 to 470w-6 (1982 & Supp. V 1987).

Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982).

33 C.F.R. Part 330 (1988) (U.S. Army Corps of Engineers' Nationwide Permit Regulations).

36 C.F.R. Part 800 (1988) (Advisory Council on Historic Preservation Regulations).

The statutory and federal regulatory provisions involved are reprinted in the Appendix (37a).

STATEMENT

This case presents important questions of statutory construction arising under the frequently litigated National Historic Preservation Act, 16 U.S.C. §§ 470 to 470w-6 (1982 & Supp. V 1987) (the "NHPA"). First and foremost, the litigation involves the question of what (if any) federally licensed activities are exempt from the NHPA's historic impact review requirements. But more broadly, the case also concerns the circumstances under which a federal court may disregard unambiguous statutory language in favor of what it deems to be a preferable interpretation. The Fifth Circuit's handling of these issues reflects a substantial departure from the literal language

of the NHPA and longstanding precepts of statutory interpretation, and its ruling is in conflict with decisions of this Court and other Circuits. The decision therefore warrants examination by this Court.

On August 6, 1987, petitioner Vieux Carre Property Owners, Residents & Associates, Inc., filed suit against the United States Army Corps of Engineers ("Army Corps" or "Corps") and others to challenge the proposed construction of the New Orleans Aquarium and Riverfront Park (the "Aquarium Project") in the Vieux Carre National Historic Landmark District.² The Vieux Carre, also known as the French Quarter, is the original section of New Orleans, Louisiana. Laid out in 1721, the Vieux Carre was one of the first planned urban areas in the Americas. *See* 46 Fed. Reg. 43,892, 43,893-94 (1981). It features a unique mix of Creole and various American styles of architecture, and it has substantially retained its original integrity from its 18th and 19th century historic period. The Vieux Carre is listed in the National Register of Historic Places and has been designated a National Historic Landmark District. *See* 16 U.S.C. §§ 470a(a), 470h-2(f) (1982); 36 C.F.R. § 65.2(a) (1988).

The Aquarium Project involves construction of both a new aquarium and a new park along the Mississippi River. *See* 875 F.2d at 455 (3a). The aquarium building itself will be a 360-by-150 foot ultra-modern edifice which the Louisiana State Historic Preservation Officer has determined would be at odds with the traditional architectural styles of the Vieux Carre and would endanger the historic character of the Vieux Carre with long-term traffic congestion, pollution, noise, and vibra-

² Petitioner is a non-profit Louisiana corporation organized over 50 years ago to encourage the preservation of the distinctive character of the Vieux Carre. Many of its members reside or own property in the Vieux Carre National Historic Landmark District.

tion. The Army Corps has jurisdiction over at least a portion of the project under section 10 of the Rivers and Harbors Act of 1899 (the "RHA"), 33 U.S.C. § 403 (1982) (37a), which requires that a permit be obtained from the Army Corps before commencing any construction that may affect navigable waters. *See* 875 F.2d at 463 (21a).

In its complaint, petitioner alleged that the project was proceeding in violation of several federal statutes, including the NHPA. The NHPA requires federal agencies to consider in advance the effects on historic properties of "any" activities they license or permit and to consult about those effects with the Advisory Council on Historic Preservation ("Advisory Council"), an independent federal agency established by the NHPA. *See* 16 U.S.C. §§ 470f, 470i. In the proceedings below, the Army Corps admitted that it did not comply with the historic impact review procedures mandated by section 470f with respect to the Aquarium Project. 875 F.2d at 455, 465 (2a, 24a). The Corps maintained that although it had licensed at least a portion of the project under RHA section 10, the permit involved was a so-called "nationwide permit" (as opposed to an individual permit).³ *See id.* at 463-64 (21a-23a). The Corps resisted petitioner's argument that such a nationwide permit is a license or permit which triggers historic impact review obligations under NHPA section 470f. *See id.* at 464-65 (23a-24a).

The District Court dismissed petitioner's claims, reasoning in part that "[t]he obligations under the NHPA apply only to proposed federal or federally assisted proj-

³ Individual permits are issued by the Army Corps for specific projects, while a "nationwide permit is a form of general permit which . . . allow[s] certain activities to occur with little, if any, delay or paperwork." 33 C.F.R. § 330.1 (1988) (40a).

ects or to projects where a license is to be issued by a federal agency.” (34a-35a.) The District Court then concluded that “neither circumstance is involved here” (35a), making no comment on petitioner’s argument that the nationwide permit itself constituted a license that triggered NHPA obligations.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. The panel agreed with petitioner’s argument that the Corps’ nationwide permit for the Aquarium Project was a license or permit within the meaning of NHPA section 470f. 875 F.2d at 464 (23a). Further, the court acknowledged that interpreting NHPA section 470f to require historic impact analysis for all projects undertaken pursuant to Army Corps nationwide permits (i) would be “true to the NHPA statutory language” and (ii) would reflect the NHPA’s statutory purpose of “widespread agency responsibility for the protection of historic interests.” *Id.* at 465 (24a). Nevertheless, finding that the “Corps’ position that nationwide permits do not trigger section 470f . . . has great practical appeal,” and relying on *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), the Fifth Circuit rejected what it described as the “literal construction of section 470f” and held that nationwide permits authorizing “truly inconsequential activities” do not trigger the requirements of section 470f. 875 F.2d at 465 (24a-25a). The panel thus remanded the case for further proceedings, including a determination whether the Aquarium Project is “so inconsequential that it escapes section 470f’s historic impact review requirements.” *Id.* at 466 (26a).

On June 28, 1989, petitioner filed a petition for rehearing and a suggestion for rehearing *en banc*. Both were denied on July 12, 1989. (28a.)

REASONS FOR GRANTING THE WRIT

In 1966, Congress enacted the NHPA to promote a broad national policy of preserving and protecting America's historic and cultural resources. In so doing, Congress declared that our nation's "irreplaceable heritage" is a "vital legacy" to be "maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b) (4). The Fifth Circuit opinion threatens that legacy by allowing federal agencies to establish at whim exceptions to Congress' command that they assume responsibility for the effects of their actions on historic properties. *See* 16 U.S.C. §§ 470f, 470h-2(d), (f), 470i (1982). The most immediate result of the Fifth Circuit's decision is that the Army Corps will be free to license thousands of projects without engaging in the brief, simple review process mandated by the NHPA to determine whether those projects will adversely affect historic properties.

In electing to ignore the unambiguous language of section 470f in favor of an interpretation with purportedly "great practical appeal," the Fifth Circuit also has adopted a standard for statutory interpretation that conflicts with long-standing precedent. By drafting an "inconsequential" exception into section 470f, the Fifth Circuit has substantially expanded the circumstances in which alternate statutory constructions may be substituted by federal courts for the unambiguous language enacted by Congress.

I. THIS COURT'S INTERVENTION IS NECESSARY TO RESOLVE A THREE-WAY DIVISION OF THE CIRCUITS WHICH COULD THWART CONGRESSIONALLY MANDATED EFFORTS TO PROTECT HISTORIC PROPERTIES.

In order to create "the most effective [historic] preservation program possible,"⁴ Congress established through the NHPA the principle that all federal agencies

⁴ H.R. Rep. No. 1916, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Admin. News 3307, 3309.

should consider relevant information about historic preservation issues and consult with preservation officials before they license any project. See 16 U.S.C. §§ 470f, 470h-2(d), (f) (39a-40a). More specifically, NHPA section 470f requires that "prior to the issuance of any license," the "head of any Federal department or independent agency having authority to license any undertaking shall . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]." 16 U.S.C. § 470f (39a). Further, section 470f requires the department or agency to afford the Advisory Council on Historic Preservation, an "independent agency of the United States Government" established by the NHPA, *id.* § 470i, a "reasonable opportunity to comment with regard to such undertaking." *Id.* § 470f (39a).

"While [the NHPA] may seem to be no more than a 'command to consider,' . . . the language is mandatory and the scope is broad." *United States v. 162.20 Acres of Land, More or Less*, 639 F.2d 299, 302 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981). A federal agency is barred from issuing "any license" or permit⁵ until it considers the effects of that action on historic properties and gives the Advisory Council an opportunity to comment. 16 U.S.C. § 470f (39a) (emphasis added). The procedures

⁵ The Advisory Council, the agency formally charged by Congress to implement section 470f of the NHPA, see 16 U.S.C. § 470s, has issued regulations interpreting the statutory term "license" to include permits. See 36 C.F.R. § 800.1(c)(2)(ii) (1988) (44a). The same regulations define "undertaking" to "mean[] any project, activity or program that can result in changes in the character or use of historic properties" which are "under the direct or indirect jurisdiction of a Federal agency or licensed . . . by a Federal agency." 36 C.F.R. § 800.2(o) (1988) (44a). These interpretations are entitled to considerable deference. See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984); *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff'd*, 635 F.2d 324 (4th Cir. 1980) (*per curiam*).

the Advisory Council has established by regulation to satisfy this consider-and-consult requirement are neither complicated nor onerous.⁶

In the proceedings below, the Fifth Circuit confronted the question whether the NHPA's consider-and-consult obligations are triggered by the Army Corps' issuance of nationwide permits. As is discussed further below (*see* pp. 13-14 *infra*), such permits authorize private parties to proceed with conducting various types of specified activities without notifying the Army Corps or obtaining further approbation, provided that certain conditions stated in the nationwide permit regulations are satisfied in advance. *See* 33 C.F.R. § 330.5 (1988) (41a-42a).

In approaching this issue, the Fifth Circuit panel noted that other courts of appeals had embraced two divergent positions. First, the panel observed that in *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985), the Tenth Circuit, interpreting similar statutory language,⁷ held that "the Corps must consider the environmental impact of each act that it authorizes, both major and minor" and that "simply allowing a party to proceed under the nationwide permit is an action by the Corps triggering its obligations to consider environmental impacts." *See* 875 F.2d at 464 (23a). In contrast, the panel noted that in *Ringsred v. City of Duluth*, 828

⁶ In a nutshell, if an agency finds that a proposed project would have no adverse effect on historic properties, the agency's section 470f obligations are concluded, and the project may go forward. *See* 36 C.F.R. § 800.5(b) (1988) (45a). If the agency finds that adverse impacts would occur (or if the State Historic Preservation Officer or the Advisory Council objects to the agency's finding of no adverse impact), however, the agency must consult with the Advisory Council and seek ways to avoid or mitigate the potential adverse impact. *Id.* § 800.5(e) (45a).

⁷ The court in *Andrews* was addressing jurisdictional language parallel to NHPA section 470f in the Endangered Species Act. The environmental assessment requirements of that Act, like those in the NHPA, are triggered by "any action" authorized by a federal agency. 16 U.S.C. § 1536(a) (3) (1982).

F.2d 1305, 1309 (8th Cir. 1987), the Eighth Circuit viewed the NHPA's section 470f consider-and-consult requirements to be triggered only by "major Federal actions" and therefore never applicable to nationwide permits. See 875 F.2d at 460, 464-65 (13a, 23a-24a). After considering these two conflicting interpretations, the Fifth Circuit opted for yet a third, holding that although nationwide permits generally trigger the NHPA's consider-and-consult requirements, section 470f should be read as providing an exemption for "nationwide permits authorizing truly inconsequential activities." 875 F.2d at 465 (25a).

Thus, in the wake of the Fifth Circuit's decision, the courts of appeals appear to be of three minds on NHPA section 470f: (1) the Tenth Circuit would apply the NHPA's consider-and-consult requirements to all Army Corps nationwide permits, (2) the Eighth Circuit apparently would treat all nationwide permits as exempt from the NHPA's requirements, and (3) the Fifth Circuit finds section 470f generally applicable to nationwide permits, except those authorizing only "inconsequential" activities. This Court's intervention is necessary to resolve this conflict of the Circuits and to confirm that the Tenth Circuit's *Andrews* interpretation should be followed. As the Fifth Circuit panel itself observed, the *Andrews* construction "reflects the NHPA's statutory purpose, which contemplates widespread agency responsibility for the protection of historic interests," and "is also true to the NHPA statutory language itself." 875 F.2d at 465 (24a).

Congress did not enact an "inconsequential" project exception to the historic review requirements of section 470f for a very simple reason. The NHPA was premised on a finding that "all too often it was not a lack of desire to preserve historic properties that was causing their loss . . . , it was simply a lack of knowledge." 113 Cong. Rec. 25,942 (1966) (statement of Sen. Widnall). See also 16 U.S.C. § 470(b)(3) (38a). In other words, activities

which lay persons considered “inconsequential” were having the very consequential effect of destroying or damaging historic or cultural treasures.⁸ Congress thus created the Advisory Council on Historic Preservation, an independent federal agency with historic preservation expertise, *see* 16 U.S.C. §§ 470i, 470j, and required in section 470f that the Advisory Council be consulted by federal agencies in determining whether any activities they proposed to license would have more than an “inconsequential” effect on historic properties.

If the “inconsequential” exception the Fifth Circuit has appended to section 470f is allowed to stand, private citizens, under the aegis of Army Corps nationwide permits, will be allowed to conduct what they deem to be “inconsequential” activities without even informing the Army Corps in advance. With no consideration of these activities by the licensing agency and certainly without any expert input from the Advisory Council, hundreds of historic properties may be damaged or destroyed. Further, relying on the decision below, other federal agencies may, without consulting the Advisory Council, ignore the NHPA and proceed with purportedly “inconsequential” projects that could jeopardize historic properties. The Fifth Circuit’s NHPA interpretation thus threatens to eliminate an effective statutory mechanism for bringing historic preservation expertise to bear *before* historic resources are irreparably damaged or destroyed, and it sends a signal to all federal agencies that they may pretermitt their congressionally mandated roles as guardians of historically significant properties.

⁸ The examples of “inconsequential” activities cited by the Fifth Circuit—“repainting and reroofing . . . structures,” 875 F.2d at 465-66 (24a) (citing 33 C.F.R. § 330.5(a)(3) (1988))—illustrate this point. In many instances, these activities would have no adverse effect. If the structure is historically and architecturally significant, however, repainting and reroofing are precisely the kinds of activities that *could* adversely affect the integrity of the property.

II. THE DECISION BELOW SANCTIONS JUDICIAL REJECTION OF UNAMBIGUOUS STATUTORY LANGUAGE IN FAVOR OF INTERPRETATIONS WITH "GREAT[ER] PRACTICAL APPEAL."

In creating an exception to section 470f for "nation-wide permits authorizing truly inconsequential activities," the Fifth Circuit has substantially broadened the range of circumstances in which a federal court may reject the plain meaning of unambiguous statutory language. The court below acknowledged that the "literal construction" of section 470f would require that historic impact reviews be made in advance for all activities conducted pursuant to Army Corps nationwide permits. 875 F.2d at 465 (24a-25a). However, relying on a faulty reading of this Court's decision in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), the court below ignored that plain meaning of section 470f and rewrote the NHPA to include an "inconsequential" projects exception which the court viewed as having "great practical appeal." 875 F.2d at 465 (24a).

This Court has consistently maintained that in construing statutes, the primary focus should be on the language of the statute itself. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Howe v. Smith*, 452 U.S. 473, 480 (1981) ("[a]s in every case involving the interpretation of a statute, analysis must begin with the language employed by Congress"). This Court has also held with equal consistency that where the terms of a statute are clear and unambiguous, judicial inquiry is complete except in "rare and exceptional circumstances." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930); *Garcia v. United States*, 469 U.S. 70, 75 (1984).

In practice, other Circuits have uniformly declared this "rare and exceptional circumstances" exception to allow deviation from a literal reading of a statute in only two situations: (1) where enforcement of the literal language

of the statute would lead to "absurd" consequences, or (2) where enforcement of the literal language would contravene clearly expressed legislative intent. See, e.g., *In re Sinclair*, 870 F.2d 1340, 1342-44 (7th Cir. 1989); *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 641 (4th Cir. 1988); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 62-63 (2d Cir. 1985); *National Freight, Inc. v. Larson*, 760 F.2d 499, 503 (3d Cir. 1985); *Henry T. Patterson Trust by Reeves Banking & Trust Co. v. United States*, 729 F.2d 1089, 1094 (6th Cir. 1984); *Ciampa v. Secretary of Health & Human Serv.*, 687 F.2d 518, 524 (1st Cir. 1982).

For example, in *Oklahoma ex rel. Dep't of Human Serv. v. Weinberger*, 741 F.2d 290 (10th Cir. 1983), plaintiff sought a declaration that a Department of Defense regulation contravened the literal language of the Randolph-Sheppard Act, 20 U.S.C. § 107-107f (1982). That Act mandates that income from vending machines located on federal property be shared with blind persons, except income from machines located "within retail sales outlets" under the control of armed forces exchange stores. Plaintiff argued that the Act restricted this exemption to vending machines physically located within exchange stores, whereas the DOD regulation applied the exemption to vending machines "within the control" of the exchanges, regardless of whether the machines were physically within the stores. The Tenth Circuit declined to enforce plaintiff's literal reading of the statute, concluding that to do so would "lead to absurd results" and "thwart the obvious purposes of the statute." 741 F.2d at 292-93. The court cited the legislative history of the exemption, which clearly indicated that Congress intended to exempt all vending machines operated by the exchanges and reasoned that since less than two percent of vending machines on military bases are actually located within exchange stores, a literal interpretation of

the Act would clearly lead to an absurd result, negating one of the purposes of the Act. *See also Smith v. Bowen*, 815 F.2d 1152 (7th Cir. 1987) (statute governing award of fees to attorney representing social security claimant cannot be read to require court to determine amount of fee at time of judgment since amount of fee cannot be known at that time); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 866 (9th Cir.) (avoiding "absurd" results reached by literal reading of Railroad Revitalization and Regulatory Reform Act), *cert. denied*, 464 U.S. 846 (1983); *Ashley, Drew & N. Ry. Co. v. United Transp. Union*, 625 F.2d 1357, 1365-66 (8th Cir. 1980) (avoiding "absurd" results reached by literal reading of Norris-LaGuardia Act).

"Rare and exceptional circumstances" of this sort are not present in this case. In the first place, the "literal construction" of NHPA section 470f does not yield an "absurd" result. The Fifth Circuit apparently perceived that adherence to the plain meaning of section 470f could have the "unreasonable and unintended" result of disrupting the Army Corps' nationwide permit program. 875 F.2d at 465 (25a). But that program is merely a device of administrative convenience through which the Army Corps, with minimal "paperwork," *see* 33 C.F.R. § 330.1 (1988) (40a), satisfies section 10 of the RHA, which requires that certain river-related construction activities may not be undertaken without advance authorization—*i.e.*, a permit—from the Army Corps. 33 U.S.C. § 403 (1982) (37a).⁹ The fact that the Army Corps has unilaterally elected, without specific congressional direction or imprimatur, to use a short-cut regulatory scheme (*i.e.*, nationwide permits) to issue statutorily mandated RHA

⁹ The nationwide permits are "automatic in that if [a party] qualifies, no application is needed before beginning" the activity authorized thereby. *Andrews*, 758 F.2d at 511.

licenses provides no basis for disregarding Congress' clear direction that "any" such license, without exception, be subject to the requirements of NHPA section 470f. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("rulemaking power granted to an administrative agency . . . is not the power to make law").¹⁰

Equally apparent is the absence of any indicia of legislative intent that would be contravened by a literal reading of section 470f. As discussed previously, the NHPA's express directive "contemplates widespread agency responsibility for the protection of historic interests." 875 F.2d at 465 (24a).¹¹

¹⁰ There is no indication that Congress intended the NHPA to be subordinate to agency regulatory programs. To the contrary, Congress has commanded that "[c]onsistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which . . . any Federal license, permit, or other approval is required) in accordance with" the NHPA. 16 U.S.C. § 470h-2(d) (39a). The House Report on this provision notes that "most Federal agencies have a primary purpose other than historic preservation; however, it is reasonable to expect that they also view themselves as multiple resource managers responding to diverse economic, social and environmental concerns—including the concerns of historic preservation." H.R. Rep. No. 1457, 96th Cong., 2d Sess. 37, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6400.

¹¹ The Fifth Circuit's conclusory opinion that Congress "clearly did not intend" that section 470f apply to "inconsequential projects," *see* 875 F.2d at 465 (24a), is not supported by the NHPA's language or legislative history. The opinion below cites to one page of legislative history, H.R. Rep. No. 1457, 96th Cong., 2d Sess. 45, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6408, but that passage simply does not support the court's conclusion. In fact, the House Report cited by the panel specifically endorses the Advisory Council's broad regulatory definition of the term "undertaking," *see* 36 C.F.R. § 800.2(o) (1988) (44a), which allows no exception such as that created by the panel. (*See* p. 7 n.5

Relying on *Church of the Holy Trinity*, the Fifth Circuit has thus created a third category of circumstances in which a court may depart from the unambiguous language of a statute, establishing precedent for judicial revision of a clear statute whenever the court identifies an alternate construction it finds more palatable. This position is plainly inconsistent with the views of this Court and the other Circuits. See, e.g., *United States v. Locke*, 471 U.S. 84, 95 (1985) ("the Judiciary [is not] licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result"); *United States v. Fountain*, 840 F.2d 509, 519 (7th Cir.) ("judicial discomfort with a surprisingly harsh rule is not enough to permit its revision"), *cert. denied*, 109 S. Ct. 533 (1988). This new precedent, which sanctions the substitution of judicial judgment for the congressional policy decisions reflected in the selection of statutory language, should be addressed and overturned by this Court.

supra.) The report makes clear that even in the case of a federal agency's minor involvement in a project, Congress expects the agency to "take into account the effects on historic properties," as required by NHPA section 470f. 1980 U.S. Code Cong. & Admin. News at 6408.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

JOHN H. BEISNER

Counsel of Record

BARBARA L. STRACK

STUART L. FULLERTON

O'MELVENY & MYERS

555 13th Street, N.W.

Washington, D.C. 20004-1109

(202) 383-5300

JAMES G. DERBES

DERBES & WALDRUP

610 Poydras Street

Suite 318

New Orleans, LA 70130

(504) 525-9538

JAMES R. LOGAN IV

650 Poydras Street

2850 Poydras Center

New Orleans, LA 70130

(504) 524-7604

Dated: October 6, 1989

Counsel for Petitioner

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-3854

VIEUX CARRE PROPERTY OWNERS,
RESIDENTS & ASSOCIATES, INC.,
Plaintiffs-Appellants,

v.

COLONEL LLOYD KENT BROWN, ETC., *et al.*,
Defendants-Appellees.

June 14, 1989

Appeal from the United States District Court
for the Eastern District of Louisiana

Before POLITZ, GARWOOD, and SMITH, Circuit
Judges.

GARWOOD, Circuit Judge:

This dispute focuses the Court's attention on a private plaintiff's enforcement of the National Historic Preservation Act (NHPA) against the United States Army Corps of Engineers (the Corps). Vieux Carre Property Owners, Residents & Associates, Inc. (the Vieux Carre), the plaintiffs-appellants in this case, is made up of land-

owners within the Vieux Carre National Historic Landmark District—popularly referred to as the French Quarter—on the Mississippi River in New Orleans, Louisiana. The Vieux Carre ultimately seeks to arrest the construction of an aquarium and riverfront park currently being erected on and just landward of the Bienville Street Wharf at the foot of Bienville Street. This appeal comes from the district court's summary dismissal of the Vieux Carre's suit on jurisdictional grounds.

The Vieux Carre first claims that the Rivers and Harbors Act, 33 U.S.C. § 403(RHA) and the Corps' regulations found in 33 C.F.R. §§ 320 through 330 (1987), require the Corps to issue a permit for the aquarium phase of the project, and that such permitting in turn requires the Corps to submit the project to the NHPA historic impact review process dictated by 16 U.S.C. §§ 470f and 470h-2(f). The Vieux Carre then claims that the park phase required an individual permit, but that even if it complied with the Corps' nationwide permit that itself triggered section 470f and required the Corps to follow the historic impact review procedures detailed in 36 C.F.R. §§ 800 *et seq.* The Corps failed to submit any of the project to the NHPA review process. Thus, the Vieux Carre sued for a declaratory judgment against the Corps and an injunction against those developing or otherwise authorizing the project, namely, the Audubon Park Commission, the City of New Orleans, the Board of Commissioners of the Port of New Orleans, and the Board of Commissioners of the Orleans Levee District. We find that the dismissal of the Vieux Carre's aquarium phase claim was proper, though for different reasons than those stated by the district court. We reverse the court's dismissal of the Vieux Carre's riverfront park claim against the Corps and remand for further legal and factual findings in relation to that claim. We affirm the court's dismissal of the Vieux Carre's request to enjoin the other appellees from proceeding with the project.

Facts and Proceedings Below

In July 1986, the Louisiana Legislature authorized the Audubon Park Commission—a local governmental entity then in charge of operating a New Orleans park and zoo—to acquire riverfront property for a world-class aquarium and riverfront park. As authorized by this legislation, in November 1986, an election was held in which New Orleans voters approved a millage tax necessary to fund bonds for construction of the project. No federal funds will be involved. Following local governmental approvals—including those by the City of New Orleans' Vieux Carre Commission, the New Orleans City Planning Commission, and the New Orleans City Council—of the proposed site at the foot of Bienville Street, in April 1987, the Audubon Park Commission submitted tentative plans to the Corps to determine whether permitting would be required. The plans describe the project in two phases: Phase A involves construction of the aquarium just landward of and overlapping slightly onto the Bienville Street Wharf; Phase B shows a park on top of the wharf, reserving the riverward face of the wharf for continued maritime use.

Near its landward edge, the Bienville Street Wharf sits atop a three-sided box levee that runs alongside the Mississippi River. The riverward vertical of the levee currently serves as the Ordinary High Water Line (OHWL) of the river, and as such is the Corps' benchmark for determining its jurisdiction under the RHA. This riverward vertical of the levee consists of a concrete and steel bulkhead. In order to achieve a desirable factor of safety against embankment failure, the foundation piles of the aquarium must be augmented by a new bulkhead, consisting of piles and sheet pile, installed just landward of the existing bulkhead. The new bulkhead admittedly will achieve the desired factor of safety. Though the existing bulkhead will be undisturbed, it ap-

pears that the primary available post-construction bulkhead support will be attributable to the new bulkhead.

The second, riverfront park phase of the project calls for removal of large metal sheds atop the wharf and the placement of sod, trees, and benches.

After reviewing the plans, the Corps concluded in May 1987 that its regulations did not require a permit for the aquarium because the entire project is to be built landward of the OHWL. Thus, the project is not within the navigable waterways of the United States and is therefore outside the Corps' RHA jurisdiction. The Corps found that the park, which will be located atop the wharf completely riverward of the OHWL and therefore indisputably within the Corps' jurisdiction, is already within a nationwide Corps permit promulgated under the RHA. It falls within this permit, the Corps asserts, because the plan submitted for review does not involve modifications that would change the dimensions of the wharf and because the riverward edge of the wharf would still be dedicated to maritime use.

The Corps informed the Audubon Park Commission of its conclusions by letter dated May 14, 1987. The Corps did not submit the project to the NHPA review process. The Vieux Carre filed this suit on August 6, 1987. Following an evidentiary hearing, the district court dismissed the suit, finding that the Vieux Carre had no direct right of action under the RHA, sections 10 and 14, 33 U.S.C. §§ 403, 408, to compel the Corps to require permitting, and that the Administrative Procedure Act (APA) does not provide for federal court review of these specific Corps decisions because they are committed to the Corps' discretion. 5 U.S.C. § 701(a)(2). As of May 1988, the plans for the aquarium had been finalized and the foundation had been poured.

We affirm the district court's dismissal of the Vieux Carre's requested injunction, finding that neither the APA nor the NHPA give a private plaintiff a right of

action against any of the defendants other than the Corps. We reverse the district court on both of its findings as they pertain to the Vieux Carre's claims against the Corps, but we approve the Corps' determination that the aquarium phase of the project did not require a permit. We remand to the district court to determine whether the riverside park in fact falls within the claimed nationwide Corps permit, and, if so, whether, *inter alia*, the nationwide permitting of the park triggers the NHPA procedures.

Jurisdiction

The Vieux Carre correctly notes that this Circuit in *Orleans Audubon Society v. Lee*, 742 F.2d 901, *reh'g denied*, 750 F.2d 69 (5th Cir. 1984), identified the APA as a route through which private plaintiffs can obtain federal court review of the decisions of federal agencies.¹ As noted in *Lee*, this route also provides the Vieux Carre something of a way around the Supreme Court's decision in *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981), which held that according

¹ The district court, however found that it did not have jurisdiction under the APA because the Corps' decisions at issue are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The courts have applied this APA reviewability exception primarily to situations in which agencies have chosen not to enforce or prosecute violations of their regulations, rather than to agency decisions on whether or not to approve activities governed by a statute that sets guidelines for determining when such approval should and should not be given. *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985). Thus, because the NHPA, the RHA, and relevant Corps regulations dictate the circumstances in which the Corps is required to issue the permits in question here, we assume that the Corps' decision not to permit the aquarium or park is not immune from judicial review under section 701(a)(2). This case is distinguishable from *Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949 (3d Cir. 1987), in which the court refused to review the Corps' decision not to enforce the conditions of a previously issued RHA dredging permit.

to the criteria announced in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), a private party has no implied right of action for violations of the RHA. *Lee*, 742 F.2d at 911, n.18. We fail to understand, however, how APA-dictated reviewability of the Corps' decisions allegedly violating the RHA gives the district court jurisdiction to enjoin such nonfederal entities as the Audubon Park Commission.

The Vieux Carre has cited a recent Tenth Circuit case that allows plaintiffs to do approximately what the Vieux Carre attempts to do here. In *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), the court ruled that it could review federal agency action—of the Bureau of Land Management (BLM)—through the APA, and that it would simultaneously enjoin the county from proceeding with a road improvement project that the private plaintiff claimed endangered a wilderness study area. The court noted that by its terms the APA does not authorize suits against nonagency defendants who benefit from an agency's violation of a statute; therefore, the plaintiff apparently lacked a right of action against the county. Still, the court allowed the injunction, reasoning that the county was a necessary party under Fed. R. Civ. P. 19(a) because the BLM was bound by statute to take any action required to protect wilderness study areas, and this would include impleading the county in order to enjoin it.²

² The *Hodel* court relied in part on *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914 (9th Cir. 1977), which allowed injunction of private developers by way of Fed.R. Civ.P. 20(a) permissive joinder. Noting that Rule 20(a) requires that the plaintiff must assert a right of relief against each defendant, the Ninth Circuit found that a local governmental entity's violation of an interstate compact by granting illegal construction approvals to developers makes those approvals invalid and gives a "right of relief against the developers to prohibit any construction on their projects." 558 F.2d at 917. Without approving or disapproving this holding, we conclude that such a private right of

As applied against the nonfederal appellees in *this* case, *Hodel's* reasoning is faulty for at least three reasons. First, such a holding obviously negates the Supreme Court's decision in *Sierra Club*. As long as the private plaintiff joined the federal agency in the action, the former could reach a nonagency defendant even without having a cause of action against that party. Second, unlike the situation in *Hodel* as to the BLM, no statute requires the Corps to enforce the RHA provision the Vieux Carre claims was violated here. In fact, 33 U.S.C. § 406 explicitly vests that authority in the Attorney General. So, the Corps had no duty to implead or enjoin the Audubon Park Commission or the other nonfederal defendants, and a right of action against them cannot be manufactured in this way.

Finally, it is implicit in Rule 19(a) itself that before a party will be joined as a plaintiff it must have a cause of action against the defendants, *McNeil Construction Co. v. Livingston State Bank*, 160 F. Supp. 809, 813 (D. Mont. 1957), and before it will be joined as a defendant the plaintiff must have a cause of action against it. See *Dunn v. Carey*, 110 F.R.D. 439, 440 (S.D. Ind. 1986) (citing to the language in Rule 19(a) that a party will not be joined if joinder deprives the court of subject matter jurisdiction), *aff'd on other grounds*, 808 F.2d 555 (7th Cir. 1986); *Melanson v. Rantoul*, 421 F. Supp. 492, 501 (D.R.I. 1976), *aff'd on other grounds*, 561 F.2d 409 (1st Cir. 1977).

In addition to *Hodel*, pre-*Sierra Club* Fifth Circuit cases discuss a private party's right to enjoin a nonagency defendant for an alleged violation of the RHA provision at issue here. In *Tatum v. Blackstock*, 319 F.2d 397, 399-400 (5th Cir. 1963), the Court allowed such an injunc-

action does not arise against nonfederal developers when a federal agency violates the RHA. Any other conclusion, we believe, would be too at odds with *Sierra Club*.

tion under the authority of a 1928 Fifth Circuit case and a partial quotation from 33 U.S.C. § 406 (omitting the delegation of enforcement to the Attorney General). In a later opinion, this Circuit limited those cases to their facts: building a dam over a navigable waterway without first obtaining the consent of Congress or the approval of the Corps. *Intracoastal Transportation, Inc. v. Decatur County*, 482 F.2d 361, 366 n.14 (5th Cir. 1973). Regardless, these cases are substantially overruled by *Sierra Club*. We also observe that the Third Circuit, simply purporting to follow *Sierra Club* without discussing access through the APA, recently found that a private plaintiff has no right to enjoin or sue a nonagency defendant for damages under the RHA. *Harmon Cove Condominium Ass'n v. Marsh*, 815 F.2d 949, 953 (3d Cir. 1987).

It would not help the Vieux Carre to argue that the Corps violated the NHPA in addition to the RHA. Although courts have allowed private plaintiffs to enjoin nonagency defendants where agencies have not complied with the NHPA, these opinions do not explain how the right of action against the nonagency defendant arises. See, e.g., *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3d Cir. 1983); cf. *D. C. Federation of Civic Associations v. Adams*, 571 F.2d 1310 (4th Cir. 1978) (indicating that it would be willing to enjoin nonagency actions if it were not ruling that the agency had in fact complied with the NHPA). Rather than through APA review, a private right of action against an agency arises under 16 U.S.C. § 470w-4, which provides for the NHPA to be enforced "in any civil action brought in any U.S. District Court by any interested person." See *United States v. 162.20 Acres of Land, More or Less*, 639 F.2d 299, 305, *reh'g denied*, 644 F.2d 34 (5th Cir.), *cert. denied*, 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed. 2d 103 (1981). Courts that have considered the issue have explicitly ruled that this claim does not extend to

actions against nonagency defendants. *See, e.g., Edwards v. First Bank of Dundee*, 534 F.2d 1242, 1245 (7th Cir. 1976); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971). By its terms, only a federal agency can violate section 470f.

The Vieux Carre has no federal claim against appellees other than the Corps.

Standing Against the Corps

The APA, 5 U.S.C. § 702, grants federal court standing to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." The Supreme Court has interpreted this to require that the interest the plaintiff seeks to protect or advance in his complaint "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). This Court generally applies this zone of interests test for standing. *See, e.g., Baker v. Bell*, 630 F.2d 1046, 1051 (5th Cir. 1980).

It is perhaps arguable that if the Vieux Carre sought review of the Corps' actions as they relate only to the RHA, it would not have APA standing because appellant's concern is historic preservation rather than the navigability of the Mississippi River.³ We need not and do

³ We note, however, that regulations promulgated by the Corps to effectuate the RHA make a "public interest review" part of its permitting process. 33 C.F.R. § 320.4(a). This "general balancing process" includes a consideration of a proposed project's cumulative effects on historic properties. And section 320.4(e) states that "[f]ull evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties and National Landmarks," The Vieux Carre could argue, then, that its concerns

not decide that issue. Even if the Vieux Carre is not within the RHA's zone of interests, however, it may have standing if the NHPA is one of the "relevant statutes" implicated by the Corps' complained of inaction. The D.C. Circuit, in *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 997 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980), noted that the Supreme Court has defined a section 702 "relevant statute" as a statute plaintiff alleges was violated. The *Solomon* court ruled that the National Environmental Policy Act (NEPA) was the statute allegedly violated where the parties did not dispute that an action of the General Services Administration had triggered the NEPA requirement to prepare an environmental impact statement.

Similarly, in its complaint, the Vieux Carre alleges the Corps' violations of the NHPA undiluted by any claimed prerequisite violations of the RHA, asserting that the Corps violated 16 U.S.C. § 470f because "the Corps' review of preliminary plans and reservation of final approval for this project constitute the requisite federal assistance to compel application of the NHPA," and because it did not submit the park phase to the section 470f process when it determined that the project fell under the nationwide permit created by 33 C.F.R. 330.5(a)(3). The Vieux Carre also asserts that the Corps violated its own regulation, 33 C.F.R. 330.5(b)(9), which directs it to evaluate the historic impact of certain projects that fall under nationwide permits. The Vieux Carre is arguably within the zone of interests sought to be protected by both the NHPA and this particular Corps regulations. *Cf. United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405,

are within the zone of interests sought to be protected by the RHA. *Cf. Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949, 91 S.Ct. 237, 27 L.Ed.2d 256 (1970) (similar provision under the Department of Transportation Act).

2415 n.13, 37 L.Ed.2d 254 (1973) ("zone-of-interests" test satisfied because environmental group plaintiffs have an environmental interest that the NEPA seeks to protect); *Cady v. Morton*, 527 F.2d 786, 791 (9th Cir. 1975) (an interest in widely shared aesthetic and environmental concerns falls within the zone of interests to be protected by NEPA); *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir.), *cert. denied*, 400 U.S. 949, 91 S.Ct. 237, 27 L.Ed.2d 256 (1970).

We therefore hold that the Vieux Carre's historic preservation concerns are arguably within the zone of interests Congress sought to protect through the interrelation of the various statutes and regulations that the Vieux Carre has claimed were violated in this action. The Second Circuit made a similar finding in *Volpe*, in which it ruled that a resident citizens' committee had standing to challenge the Corps' issuance, without prior approval of the Secretary of Transportation or consent from Congress, of a permit to the State of New York to dredge and fill the Hudson River for construction of a proposed expressway. The *Volpe* court found that the plaintiffs were aggrieved within the meaning of at least three relevant statutes. *Id.* at 104. First, because part of the project was a causeway, the Corps should have secured consent for the project from the Secretary of Transportation as required by the Department of Transportation Act. Plaintiff's environmental interests were within the zone of interests sought to be protected by this statute because the Act required the Secretary to consider historical values before approving a project under its jurisdiction. The *Volpe* court also found other, more directly relevant statutes that provided those plaintiffs with standing. These included the Hudson River Basin Compact Act, which instructed all agencies to consider the immense economic, natural, scenic, historic, and recreational value of Hudson River Basin resources before approving activities affecting the area. Finally, the court found that

the plaintiffs had standing under the Corps' own regulations, which directed it to evaluate factors such as environmental effects before issuing such permits. *Id.* at 105.

In summary, although the Vieux Carre cannot enjoin the Audubon Park Commission's project, it has standing to assert its claim for a declaratory judgment against the Corps.

Consideration of Aquarium Plans

The Vieux Carre argues that the Corps' May 14, 1987 response to inquiries about necessary permits for the Audubon Park project triggered the historical impact evaluation procedures of the NHPA, 16 U.S.C. § 470f, in four different ways: through the Corps' continuing supervision over the aquarium phase of the project even if no license was required; through the allegedly erroneous determination that no license was necessary for the aquarium despite the requirements of the RHA; because an individual license should have been issued for the park phase; and, even if no new license were necessary, by its determination that the park fell under a nationwide permit. The proper interpretation of section 470f is therefore relevant to all four assertions.

This provision of the NHPA provides:

"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the

Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking. (Emphasis added.)

In effect, the Vieux Carre claims that the Corps' reserved final approval of plans for the aquarium phase constitutes indirect jurisdiction requiring the Corps to subject the project to the requirements of section 470f. We disagree. This is simply too attenuated.

Regardless of the projects arguably included in the first clause of the first sentence of section 470f, the second clause thereof makes it clear that the agency need not act unless it is about to approve an expenditure of federal funds or issue a license. The scant legislative history verifies this understanding of the scope of section 470f: "The committee agreed that Federal agencies having direct or indirect jurisdiction over various undertakings, either through Federal funding or through their licensing powers, should recognize these [preservation] values." H.R. No. 1916, *reprinted in* 1966 U.S. Code Cong. & Admin. News, 3307, 3310. Although no cases have been found that interpret section 470f federal assistance as broadly as the Vieux Carre proposes, at least one gives it a very restrictive meaning. *See Ringsred v. Duluth*, 828 F.2d 1305, 1309 (8th Cir. 1987), (equating section 470f federal assistance with the explicit triggering requirement for action under the NEPA—"major federal undertaking").

We conclude that section 470f is not triggered by either the Corps' instructions for the project developers to submit final plans of the aquarium phase, or by its surveillance of the project to ensure that no permits become necessary. Significantly, circuit courts have ruled that federal environmental protection statutes do not enlarge the Corps' jurisdiction. *See, e.g., Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985)

(stating that the Endangered Species Act does not enlarge the jurisdiction of the Corps under the Clean Water Act); *United States v. Stoeco Home, Inc.*, 498 F.2d 597, 607 (3d Cir. 1974), *cert. denied*, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975) (such statutes do not enlarge the Corps' jurisdiction under the RHA).

Permitting the Aquarium

The parties do not dispute that an RHA section 10 permit is a "license" under section 470f. *See* 36 C.F.R. §§ 800.1(c)(2)(ii) and 800.2(o) (1987). They do dispute whether the Corps was required to issue a section 10 permit for the aquarium phase. That section provides in relevant part:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier . . . breakwater, bulkhead, jetty, or other structures in any port, . . . navigable river, or other water of the United States . . . except on plans recommended by the Chief of Engineers. . . ." 33 U.S.C. § 403.

Before looking at the regulations and case law on the scope of the Corps' jurisdiction under the RHA, we must determine the applicable standard for our review of an agency's jurisdictional determination. The APA, 5 U.S.C. § 706(2), allows courts to set aside agency actions, findings, and conclusions found to be:

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

“(D) without observance of procedure required by law;

“(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

“(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”

The Supreme Court interpreted this statute in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 822-25, 28 L.Ed.2d 136 (1971), stating that review under the substantial evidence test is proper *only* when agency action is taken pursuant to a rulemaking provision of the APA itself, or when it is based on a public adjudicatory hearing. *Id.* 91 S.Ct. at 822-23. The Corps' action in this case falls into neither of these categories.

This Circuit, in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), considered its standard of reviewing an agency's alleged failure to exercise its permitting jurisdiction as extensively as it should have. We held that under the APA's section 706 and *Volpe*, we could overturn an agency's determination of the *extent* of its jurisdiction only when the agency determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; that is, when the agency failed to consider relevant factors or made an error in judgment. *Id.* at 905.⁴ One year after

⁴ However, the *Avoyelles* opinion distinguishes situations in which “the court must determine whether the property falls under the agency's jurisdiction at all before it may determine whether the exercise of the agency's jurisdiction is appropriate,” *id.* at 906, citing as support *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 96 S.Ct. 579, 582, 46 L.Ed.2d 533 (1976), which, citing *Volpe*, used the substantial evidence test to review the sufficiency of the factual predicate necessary

Avoyelles, this Circuit applied the section 706(2)(A) arbitrary and capricious standard of review to an agency's determination that it had no RHA-permitting jurisdiction. *Lee*, 742 F.2d at 907 n.11 (citing to *Avoyelles* and section 706(2)(A-D)). Thus, the *Lee* Court carried *Avoyelles* one step further—applying the section 706(2)(A) arbitrary and capricious standard of review to pure jurisdictional determinations.

Thus, this Court must decide whether the Corps' determination that it had no permitting authority over the aquarium was arbitrary and capricious in light of RHA section 10 and the cases and regulations that define the scope of the Corps' RHA section 10 jurisdiction. *See* 33 C.F.R. §§ 320-330. Section 322.3(a) requires the Corps to issue permits under section 10 for "structures and/or work in or affecting navigable waters of the United States," but then states that certain activities are permitted instead by 33 C.F.R. § 330 as nationwide permits. "Navigable waters of the United States" is defined in 33 C.F.R. § 329. Section 322.3(a) provides that structures and work must be permitted if they are in such waters, or "affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity."

The general definition of navigable waters is found in 33 C.F.R. § 329.4:

"Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the

for the agency's exercise of its jurisdiction. The Natural Gas Act, however, rather than the APA, provided the *Transcontinental* Court with jurisdiction to review the Federal Power Commission's action.

entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity."

Section 329.11(a)(1) specifically identifies the boundaries of navigable waters in rivers and lakes as "all the land and waters below the ordinary high water mark," which

"on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas."

Finally, section 329.3 states that precise definitions of "navigable waters of the United States" are dependent on judicial interpretation. Although no Fifth Circuit cases specifically approve section 329.11(a), other courts have explicitly approved the regulation as the proper limit of the Corps' RHA section 10 jurisdiction, *see, e.g., Swanson v. United States*, 789 F.2d 1368, 1371 (9th Cir. 1986); *Buttrey v. United States*, 573 F. Supp. 283, 297-98 (E.D.La. 1983), and the regulation comports with the Supreme Court's determination that federal regulatory power under the commerce clause "extends to the entire stream and the stream bed below ordinary high-water mark." *United States v. Rands*, 389 U.S. 121, 88 S.Ct. 265, 267, 19 L.Ed.2d 329 (1967).

The Corps determined that the aquarium phase of the Audubon Park project was "beyond the ordinary high water line of the Mississippi River, *i.e.*, all construction is landward of the box levee." Because the Vieux Carre does not challenge the Corps' treatment of this marker as the OHWL at the Bienville Street Wharf, and because the Vieux Carre stipulated that the foundation of the

aquarium will be entirely landward of the existing levee, the second clause of RHA section 10 does not require permitting of the aquarium. We must therefore determine whether the Corps' implicit conclusion that the aquarium project will not *affect* navigable capacity in waters of the United States—that is, will not create an “obstruction” under the first clause of RHA section 10—is arbitrary and capricious.

The Supreme Court has encouraged a broad interpretation of a section 10 “obstruction,” ruling that it includes not only activities causing a measurable fluctuation in the water level, but also clogging of the channel with deposits of inorganic solids. *United States v. Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 889, 4 L.Ed.2d 903 (1960). This Circuit has held that canal dredging activities shoreward of the mean high tide line may constitute an obstruction to navigable capacity. *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1298-99 (5th Cir. 1976) (citing *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964), which found an obstruction where defendant had overloaded his riparian land and thereby caused shoaling in a navigable channel).

The Vieux Carre asserts that two different aspects of the aquarium project will obstruct navigability in the Mississippi River: the circulation of water between the river and the aquarium and the possible failure of the bank at the box levee caused by construction of the aquarium. As to the first claimed “obstruction,” the Corps points out that project plans submitted to the Corps after its initial determination that a permit was not required contemplate an internal water flow system that will not circulate river water. The Vieux Carre cites no authority that such circulation would constitute an obstruction to navigable capacity even if it were still planned.

The Vieux Carre's second claimed "obstruction" has more arguable substance. The administrative record shows that, prior to its initial determination that a permit was not required, the Corps was aware that the bank stability at the Bienville Street Wharf was about 1.0 or 1.1, though the Corps' own standards for flood protection call for a 1.3 stability factor. The Corps' correspondence states, however, that the floodwall (which is in place at the Bienville Street Wharf landward of the aquarium site) was built seventy feet further landward than otherwise necessary in order to compensate for low bank stability. Consequently, the Corps had no objection to the project.

Correspondence in the administrative record indicates that this low bank stability is a preexisting condition. Thus, it is difficult to say that the *aquarium* constitutes an obstruction to navigable capacity. However, the Vieux Carre points out that in a letter dated May 19, 1987 (two days after the Corps' initial determination that a permit was not required), a Corps official in its operations division stated that "[i]t is noted that the plans call for the addition of fill material to the bank landward of the existing box levee. This will further lower the safety factor of the existing bank." A similar statement is found in an internal memorandum from an official in the Corps' engineering division.

Assuming that the administrative record shows unequivocally that the aquarium construction will to some extent decrease the stability of the existing box levee, or that most of the available post-construction bulkhead bank support will be attributable to the new bulkhead landward of the existing levee, this does not require the conclusion that the project will obstruct navigable capacity. This is true even if we further assume that the possible dangers that the record suggests could conceivably at some later time cause an effect on the riverward side of the existing box levee—such as if a bank failure

toppled the wharf (much of which is concededly riverward of the box levee) into the river.⁵

The RHA's first section 10 clause, which the Vieux Carre argues mandates a Corps permit for the aquarium, states that a party may not create an obstruction to the navigable capacity of any waters of the United States. The Corps' regulations interpret this statute as requiring a Corps permit for activities that "affect" navigable waters—those that "affect the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity." 33 C.F.R. § 322.3(a). The imprecise statutory language of section 10 leaves the Corps with quasi-legal authority to determine what "effects" constitute "obstructions" or "impacts" to navigable capacity. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985) ("[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress"); *American Trucking Associations, Inc. v. I.C.C.*, 722 F.2d 1243, 1248 (5th Cir. 1984) ("[e]ven if an agency's interpretation would not be the one we would adopt if looking at a statute completely afresh, we ordinarily accept that agency's interpretation of its own statute if the interpretation 'has a reasonable basis in law'"). We find that it is reasonable for the Corps to determine that the possibility of minor or inconsequential effects within the OHWL does not impact or obstruct navigable capacity within the meaning of section 10.

It appears that based on such an understanding of "impact" or "obstruction," the Corps here made a jurisdictional determination that the aquarium construction's mere possible future effects in navigable waters were nei-

⁵ A May 22, 1987 letter from a Corps official to the Orleans Levee District states that "a bank failure could cause significant damage to the existing wharf, box levee, and facilities landward of the wharf,"

ther sufficiently likely nor severe enough to make the aquarium's construction—occurring entirely on land—an impact on or obstruction of navigable capacity within the meaning of section 10. We conclude that this decision is neither arbitrary, capricious, an abuse of discretion, nor otherwise contrary to law.

Finally, the Vieux Carre claims that the Corps' failure to exercise its permitting jurisdiction over the aquarium flew in the face of the 33 C.F.R. § 320.4 public interest review policies already discussed. In short, the Vieux Carre claims that because of the adverse impact on a historic district, the Corps' failure to permit was arbitrary and capricious. This argument is unpersuasive. Even if such an adverse impact was obvious, this public interest review regulation is clearly intended as a prerequisite to a decision to permit an activity within the Corps' jurisdiction, rather than a factor in the decision on whether jurisdiction exists at all.

Permitting the Riverside Park

The Corps admits that the park phase of the project comes under a nationwide permit, but maintains that such a permit is not subject to the historical impact review procedures of 16 U.S.C. §§ 470f and 470h-2(f).⁶ The Vieux

⁶ The Vieux Carre has asserted that all of the challenged Corps decisions trigger the NHPA's section 470h-2(f) in addition to section 470f. Section 470h-2(f) states:

"Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking."

Because we find that this section is inapplicable when a federal agency no more than issues a license or permit, we will not address this provision again.

Carre contends that (1) the park is not permitted by a nationwide permit and therefore requires an individual permit; (2) if a nationwide permit covers the park, making an individual permit unnecessary, that nationwide permit is a "license" triggering section 470f's historic impact review procedures.

The original Bienville Street Wharf, permitted by the Corps in 1930, could itself come within only one nationwide permit, that under the provisions of 33 C.F.R. § 330.3(b) for "[s]tructures or work completed before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation." The Corps stipulated that the reconstruction of the wharf pursuant to the 1930 permit affected the navigability of the Mississippi River. Thus, the original wharf structure does not fall under a nationwide permit.

That does not mean, however, that the park phase cannot fall under such a permit. Section 330.5(a)(3) grants nationwide permits for:

"The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted."

This nationwide permit is subject to the section 330.5(b)(9) requirement that the district engineer give the

advisory council an opportunity to comment if he determines that historic properties may be adversely affected by the repair, rehabilitation, or replacement.

If the riverfront park does not fit within this section 330.5(a)(3) nationwide permit, it must be individually permitted because its location riverward of the box levee—the OHWL—places it within the navigable waters of the United States and the Corps' jurisdiction under the second clause of RHA section 10. If an individual permit is necessary, the NHPA section 470f historic impact review procedures would concededly be triggered. Before discussing whether the park falls within the section 330.5(a)(3) permit, however, we address the relationship between nationwide permits and section 470f.

The Vieux Carre asserts that even if we find that the park project is covered by the section 330.5(a)(3) nationwide permit, "a permit is a permit," and nothing in the wording of section 470f indicates that some federal agency licensing is exempt from its requirements. The Corps' regulations in fact state that permits are either "in the form of individual permits or general permits." 33 C.F.R. § 325.5(a). A "nationwide permit" is simply "a type of general permit." See 33 C.F.R. §§ 325.5(c)(2) and 330.1.

Interpreting the Clean Water Act (CWA), similar in relevant part to the NHPA, the Tenth Circuit, in *Andrews*, 758 F.2d at 512-13, held that by allowing a party to proceed under a nationwide permit the Corps had triggered provisions of the CWA requiring agencies to issue environmental impact statements. In so holding, the court distinguished the CWA from the NEPA, which explicitly states that it is triggered by "major federal actions." As noted above, however, the Eighth Circuit recently approved the parties' treatment of the NHPA's section 470f "undertaking" requirement as "coterminous" with the NEPA's "major Federal actions" triggering event. *Ringsred*, 828 F.2d at 1309; cf. *Lee*, 742 F.2d at 901 (re-

ferring throughout to activities falling under a nationwide permit as "exempt" from permitting requirements).

The Tenth Circuit's *Andrews* interpretation, if adopted for the NHPA, reflects the NHPA's statutory purpose, which contemplates widespread agency responsibility for the protection of historic interests. *See, e.g.*, 16 U.S.C. § 470(b)(4); H.R.Rep. No. 1916, 89th Cong., 2d Sess. 7, reprinted in 1966 U.S.Code Cong. & Admin.News 3307, 3309. It is also true to the NHPA statutory language itself.

Section 330.5(b)'s incorporation of an accelerated historic review procedure as a precondition to a project falling under a section 330.5(a)(3) nationwide permit does not seem to help the Corps' case. In addition to the fact that the Corps concedes that it did not evaluate the historic impact of either phase of the project, we note that through correspondence the Advisory Council has warned the Corps that section 330.5(b)(9) does not satisfy section 470f requirements. Indeed, regulations promulgated under the NHPA provide for counterpart regulations only under specific circumstances:

"In consultation with the Council, agencies may develop counterpart regulations to carry out the section 106 process. When concurred in by the Council, such counterpart regulations shall stand in place of these regulations for the purposes of the agency's compliance with section 106." 36 C.F.R. § 800.15 (1987).

The Corps' position that nationwide permits do not trigger section 470f, however, has great practical appeal, especially in relation to the nationwide permit described in 33 C.F.R. § 330.5(a)(3), which unquestionably covers such activities as repainting and reroofing original structures. Congress clearly did not intend to require the Corps to subject such truly inconsequential projects to the procedural complexities of section 470f. *See National*

Historic Preservation Act Amendments of 1980, H.R. No. 96-1457, 1980 U.S.Code Cong. & Admin.News 6378, 6408; *cf.* *162.20 Acres of Land*, 639 F.2d at 302 n. 3. Such a literal construction of section 470f is unreasonable and unintended, and as such is a result we must endeavor to avoid. *See, e.g., United States v. Mendoza*, 565 F.2d 1285, 1288, *on reh'g*, 581 F.2d 89 (5th Cir.1978) (citing "the celebrated" *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), as the seminal case approving judicial avoidance of absurd but literal statutory constructions). Moreover, the applicability of section 470f should not be at the whim of the Corps' subsequent "permit" label; such labeling does not alter congressional intent.

And, as pointed out by the Corps, the nationwide permits of 33 C.F.R. § 330 are specifically designed to expedite activities with inconsequential effects on the RHA concerns. *See* 33 C.F.R. § 330.1 (stating that nationwide permits "are designed to allow certain activities to occur with little, if any, delay or paperwork"). Indeed, "[t]he purpose of the nationwide permit system is to allow certain types of [activities to go forward] without prior Corps approval." *Lee*, 742 F.2d at 909; *see also Andrews*, 758 F.2d at 511. Consequently, 33 C.F.R. § 330.1 notes that some of its chapter's nationwide permits require notification to the district engineer prior to commencement of the activity in question. Presumably, these are the more significant projects—those more likely to have measurable impacts on navigation. We hold that nationwide permits authorizing truly inconsequential activities are not triggering "licenses" under section 470f.

We now turn to whether section 330.5(a)(3) authorizes such inconsequential activities, for we find that the regulation's failure to require notification by the "permittee" to the Corps is not dispositive of the issue. This nationwide permit has not previously been interpreted by a federal court in a published opinion. The Corps ap-

parently determined that the park constitutes a "rehabilitation" or "replacement" of the wharf, that the park plans do not deviate from the 1930 plans of the wharf except for minor deviations due to changes in materials or construction techniques that are necessary for the rehabilitation or replacement, and that the park is not a use differing from uses specified in the 1930 wharf permit. The reviewing court must determine whether the Corps' interpretation of its own regulation is reasonable and consistent with the regulations themselves. *Lyng v. Payne*, 476 U.S. 926, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986). Because the district court did not address this issue, we remand for an interpretation of the scope of section 330.5(a)(3); a determination of whether the Corps' finding that the riverfront park is covered by this nationwide permit (as the district court defines it) was arbitrary or capricious; and if the park is covered by section 330.5(a)(3), a ruling on whether the project is so inconsequential that it escapes section 470f's historic impact review requirements.

Finally, if the district court finds that the riverfront park does fall under section 330.5(a)(3) and is inconsequential, it must also address the Vieux Carre's argument that this nationwide permit is invalid because the Corps did not evaluate the park's impact on historic properties as is required by the Corps' own regulation—section 330.5(b)(9). The Audubon Park Commission notified the Corps (so as to apparently trigger that regulation) when it submitted plans for the project and asked whether permits would be necessary.

Conclusion

Because we find that the Vieux Carre has no private right of action under the RHA, and that the APA grants judicial review only of federal agency actions, we affirm the district court's dismissal of the Vieux Carre's claims against all defendants except the Corps. We further hold

that the Corps' determination that the aquarium phase of the project was outside its RHA section 10 permitting jurisdiction reflects a reasonable interpretation of the statute and an evaluation of these specific facts that is neither arbitrary nor capricious. Finally, we remand to the district court for a ruling on whether the park phase falls within the nationwide permit in 33 C.F.R. § 330.5 (a) (3). If the district court determines that the Corps' interpretation of this nationwide permit regulation, or its finding that the park is within the regulation, is arbitrary and capricious, the project must be individually permitted because it is within the Corps' RHA jurisdiction, and thus is subject to section 470f review. If, however, the district court sustains the Corps' determination that the park phase does fall within this nationwide permit regulation, the court is to go on to determine whether the project is so inconsequential that it nevertheless escapes the historic preservation review requirements of NHPA section 470f; and if it does thus escape section 470f, the district court must address section 330.5 (b) (9).

Accordingly, the judgment of the district court is AFFIRMED in part and REVERSED in part, and the cause is REMANDED for further proceedings consistent herewith.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3854

VIEUX CARRE PROPERTY OWNERS, RESIDENTS &
ASSOCIATES, INC.,
Plaintiffs-Appellants,
versus

COLONEL LLOYD KENT BROWN, ETC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion JUNE 14, 5 Cir., 1989, — F.2d —)

(Filed July 12, 1989)

Before POLITZ, GARWOOD and SMITH, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-3700

Section "H"

VIEUX CARRE PROPERTY OWNERS

vs.

COL. LLOYD KENT BROWN

ORDER AND REASONS

[Filed September 21, 1987]

Plaintiff Vieux Carre Property Owners, Residents & Associates, Inc., seeks to enjoin construction of the New Orleans Aquarium and Riverfront Park adjacent to the Mississippi River on the ground that the decision by the defendant U.S. Army Corps of Engineers ("Corps") not to require a Corps permit for said project was unlawful. For the following reasons, judgment will be entered dismissing plaintiff's suit.

The proposed New Orleans Aquarium building (Phase A) will be constructed entirely landward of the box levee vertical at the Bienville Street Wharf, on the river side of the concrete flood wall constructed several years ago by the Corps. The Corps treats the box levee vertical as the ordinary high water mark in the river. The Corps considers the floodwall, and not the box levee, the main line levee for flood protection in the area.

The Riverfront Park (Phase B) will be constructed on the Bienville Street Wharf, owned by defendant Board

of Commissioners of the Port of New Orleans (the "Dock Board") ; the wharf is constructed atop the box levee. The wharf will be resurfaced, trees will be planted on the wharf, and park benches and other park facilities will be installed.

There are no genuine issues of material fact, only questions of law related primarily to the decision of the Corps that no permit is required for the project. The Corps decision is based upon two undisputed facts: Phase A, the Aquarium, is entirely landward of the ordinary river high water line, and Phase B is located entirely upon a wharf permitted since 1930.

Plaintiff's complaint alleges seven causes of action. Two of the claims are based upon the Rivers & Harbors Appropriations Act of 1899 ("RHA Act"). Plaintiff contends that Sections 10 and 14 of the RHA Act require a Corps permit before the construction at issue.

The pertinent provisions of the RHA Act are as follows:

Section 10.

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any

breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403.

Section 14.

It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: *Provided*, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest: *Provided further*, That the Secretary may, on the recommendation of the Chief of Engineers, grant permission for the alteration or permanent occupation or use of any of the aforementioned public works when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.

33 U.S.C. § 408.

In *California v. Sierra Club*, 101 S.Ct. 1775 (1981), the Supreme Court dismissed a claim brought under Section 10 of the RHA Act by an environmental organization and two private citizens concerning water diversion facilities in California. The Court declined to reach the merits of whether permits were required for state water allocation projects: the holding that "there is no private cause of action permitting respondents to commence this action disposes of the cases." *Id.* at 1781. Specifically, the Court held that the language and legislative history of the RHA Act do not indicate a Congressional intent to create "federal rights for the especial benefit of a class of persons but rather that it [the Act] was intended to benefit the public at large through a general regulatory scheme to be administered by the then Secretary of War." *Id.* Thus there is no private remedy under Section 10 of the RHA Act. Consequently, we dismiss plaintiff's cause of action under Section 10 of the RHA Act and regulations issued pursuant thereto.

We also dismiss plaintiff's cause of action under Section 14 of the Act. Although the Court in *Sierra Club* interpreted only Section 10 of the Act, the Court's determination in *Sierra Club* that neither the language nor the legislative history of the RHA Act indicate Congressional intent to create a private remedy also applies to Section 14.

In *Louisiana v. M/V TESTBANK*, 752 F.2d 1019, 1031 (5th Cir. 1985), the Fifth Circuit Court of Appeal applied the *California v. Sierra Club* reasoning to Section 13 of the RHA Act. The Fifth Circuit's reasoning is equally applicable to a claim under Section 14:

While the Court in *California v. Sierra Club* addressed only the question whether a private cause of action should be implied under Section 10, we think the Court's decision requires a conclusion that private actions may not be brought under Section 13

either. Both sections were enacted to insure the Federal Government's ability to prevent the obstruction of navigable waterways. We find the Court's analysis of Section 10 under *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) equally applicable to Section 13. *Id.* n. 15.

Plaintiff also contends that this court can review the Corps' refusal to require a permit under the Administrative Procedures Act ("APA"). 5 U.S.C. § 701-706. In *Heckler v. Chaney*, 105 S.Ct. 1649 (1985), the Court determined the extent to which an administrative agency's decision not to undertake enforcement action is subject to judicial review under the APA. *Id.* at 1651. The Court stated that a party seeking review must first clear the hurdle of Section 701. Under Section 701(a), judicial review is not available to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (a) (1), (2).

Even if Section 701(a) (1) is not applicable because there is no specific prohibition of judicial review in the text of the RHA Act, Section 701(a) (2) precludes judicial review of the Corps' inaction, because an agency's decision not to take enforcement action is presumptively unreviewable by a court. *Heckler*, 105 S.Ct. at 1656.

In this case, the presumption of unreviewability is not rebutted. The RHA Act does not withdraw discretion from the Corps; Sections 10 and 14 clearly *grant* discretion. Thus, we dismiss plaintiff's claim seeking judicial review under the APA of the Corps' refusal to require a permit for the proposed project.

Plaintiff further contends that the Corps is obligated to consult the Advisory Council on Historic Preservation and the State Historic Preservation Officer pursuant to the National Historic Preservation Act ("NHPA") of 1966, 16 U.S.C. § 470 *et seq.* The obligations under the

NHPA apply only to proposed federal or federally assisted projects or to projects where a license is to be issued by a federal agency. 16 U.S.C. § 470f. Neither circumstance is involved here.

Plaintiff also claims the Corps was required to prepare an environmental impact statement pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq.* This act requires an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Actions" are defined to include "the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action." 40 C.F.R. § 1508.18. We have determined that the failure to act by the Corps is not reviewable by this court under either the RHA Act or the APA. In addition, Section 1508.18(b) states that:

(b) Federal actions tend to fall within one of the following categories:

* * *

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

The Corps has not issued a permit approving the proposed project; the Corps has simply determined that no permit is required for the project. Also, no federal assistance has been given to the project. Thus, there is no federal action triggering NEPA's application.

Plaintiff asserts three other causes of action equally without merit:

1. The Corps as a licensing agency should have determined the environmental impact of the project

and fulfilled other requirements of Executive Order No. 11988, 44 F.R. 43239, on floodplain management. Plaintiff "concedes that it has no private right of action under that directive" (Plaintiff's pre-trial memorandum, at 23). See *Watershed Associates Rescue v. Alexander*, 586 F.Supp. 978, 987-88 (D.Neb. 1982).

2. If the proposed project will discharge seawater into the Mississippi River, a Corps permit is required. Plaintiff has stipulated that the project plans no longer propose discharge of seawater into the river.

3. Contrary to plaintiff's assertion, the Corps' own regulations on Nationwide Permits, 33 C.F.R. § 330.5 (b) (9), do not require consultation with the Advisory Council on Historic Preservation.

For a federal agency or court to inject itself here would impose federal requirements upon a purely local project. Cf. *Citizens for a Better St. Clair City v. James*, 648 F.2d 246, 250-51 (5th Cir. 1981). We decline to do so.

/s/ Adrian G. Duplantier
United States District Judge

September 21, 1987

STATUTES AND FEDERAL REGULATIONS
INVOLVED

Selected Provision of the Rivers and Harbor Act of 1899, ch. 425, 30 Stat. 1151:

33 U.S.C. § 403 (1982) :

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Selected Provisions of the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* (1982) :

16 U.S.C. § 470 (1982) :

(a) This subchapter may be cited as the "national Historic Preservation Act".

(b) The Congress finds and declares that—

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic

preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470f (1982) :

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470h-2(d) (1982) :

Consistent with the agency's missions and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this subchapter and, give consideration to programs and projects which will further the purposes of this subchapter.

16 U.S.C. § 470h-2(f) (1982) :

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

Selected Provisions of the Army Corps of Engineers
Nationwide Permit Regulations, 33 C.F.R. Part 330
(1988) :

33 C.F.R. § 330.1 (1988) :

The purpose of this regulation is to describe the Department of the Army's (DA) nationwide permit program and to list all current nationwide permits which have been issued by publication herein. A nationwide permit is a form of general permit which may authorize activities throughout the nation. (Another type of general permit is a "regional permit" and is issued by division or district engineers on a regional basis in accordance with 33 CFR Part 325). Copies of regional conditions and modifications, if any, to the nationwide permits can be obtained from the appropriate district engineer. Nationwide permits are designed to allow certain activities to occur with little, if any, delay or paperwork. Nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Failure to comply with a condition does not necessarily mean the activity cannot be authorized but rather that the activity can only be authorized by an individual or

regional permit. Several of the nationwide permits require notification to the district engineer prior to commencement of the authorized activity. The procedures for this notification are located at § 330.7 of this Part. Nationwide permits can be issued to satisfy the requirements of section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and/or section 103 of the Marine Protection, Research and Sanctuaries Act. The applicable authority is indicated at the end of each nationwide permit.

33 C.F.R. § 330.3(b) (1988):

The following activities were permitted by nationwide permits issued on July 19, 1977, and unless modified do not require further permitting:

* * * *

(b) Structures or work completed before December 18, 1968, or in waterbodies over which the district engineer had not asserted jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation. (Section 10)

33 C.F.R. § 330.5(a) (3) (1988):

Nationwide permits.

(a) *Authorized activities.* The following activities are hereby permitted provided they meet the conditions listed in paragraph (b) of this section and, where required, comply with the notification procedures, of § 330.7.

* * * *

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill constructed prior to the requirement

for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. Maintenance dredging and beach restoration are not authorized by this nationwide permit. (Sections 10 and 404)

33 C.F.R. § 330.5(b)(9) (1988):

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

* * * *

(9) That, if the activity may adversely affect historic properties which the National Park Service has listed on, or determined eligible for listing on, the National Register of Historic Places, the permittee will notify the district engineer. If the district engineer determines that such historic properties may be adversely affected, he will provide the Advisory Council on Historic Preservation an opportunity to comment on the effects on such historic properties or he will consider modification, suspension, or revocation in accordance with 33 CFR 325.7. Furthermore, that, if the permittee before or during prosecution of the work authorized, encounters a historic property that has not been listed or determined eligible for listing on the National Register, but which

may be eligible for listing in the National Register, he shall immediately notify the district engineer.

Selected Provisions of the Advisory Council on Historic Preservation Regulations, 36 C.F.R. Part 800 (1988):

36 C.F.R. § 800.1(a), (b) (1988):

Authorities, purposes, and participants.

(a) *Authorities.* Section 106 of the National Historic Preservation Act requires a Federal agency head with jurisdiction over a Federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's undertaking on properties included in or eligible for the National Register of Historic Places and, prior to approval of an undertaking, to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Section 110(f) of the Act requires that Federal agency heads, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking and, prior to approval of such undertaking, afford the Council a reasonable opportunity to comment. These regulations define the process used by a Federal agency to meet these responsibilities, commonly called the section 106 process.

(b) *Purposes of the section 106 process.* The Council seeks through the section 106 process to accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest. * * *

36 C.F.R. § 800.1(c) (2) (ii) (1988) :

(c) *Participants in the section 106 process—*

* * * *

(2) *Interested persons.* Interested persons are those organizations and individuals that are concerned with the effects of an undertaking on historic properties. Certain provisions in these regulations require that particular interested persons be invited to become consulting parties under certain circumstances. In addition, whenever the Agency Official, the State Historic Preservation Officer, and the Council, if participating, agree that active participation of an interested person will advance the objectives of section 106, they may invite that person to become a consulting party. Interested persons may include:

* * * *

((ii) *Applicants for Federal assistance, permits, and licenses.* Where the undertaking subject to review under section 106 is proposed by an applicant for Federal assistance or for a Federal permit or license, the applicant may choose to participate in the section 106 process in the manner prescribed in these regulations.

36 C.F.R. § 800.2(o) (1988) :

“Undertaking” means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities,

or programs and any of their elements not previously considered under section 106.

36 C.F.R. § 800.5(a), (b) and (e) (1988):

Assessing effects.

(a) *Applying the Criteria of Effect.* In consultation with the State Historic Preservation Officer, the Agency Official shall apply the Criteria of Effect (§ 800.9(a)) to historic properties that may be affected, giving consideration to the views, if any, of interested persons.

(b) *When no effect is found.* If the Agency Official finds the undertaking will have no effect on historic properties, the Agency Official shall notify the State Historic Preservation Officer and interested persons who have made their concerns known to the Agency Official and document the findings, which shall be available for public inspection. Unless the State Historic Preservation Officer objects within 15 days of receiving such notice, the Agency Official is not required to take any further steps in the section 106 process. If the State Historic Preservation Officer files a timely objection, then the procedures described in § 800.5(c) are followed.

* * * *

(e) *When the effect is adverse.* If an adverse effect on historic properties is found, the Agency Official shall notify the Council and shall consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on historic properties. Either the Agency Official or the State Historic Preservation Officer may request the Council to participate. The Council may participate in the consultation without such a request.

5
NO. 89-563

Supreme Court, U.S.

FILED

NOV 2 1989

JOSEPH F. SPANIOL, JR.
CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1989

**VIEUX CARRE PROPERTY OWNERS, RESIDENTS &
ASSOCIATES, INC.,**

Petitioner,

VERSUS

COLONEL LLOYD KENT BROWN, ET AL.,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF OF THE AUDUBON PARK COMMISSION
AND OF THE CITY OF NEW ORLEANS IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

**OKLA JONES, II
ELEANORE K. ROMER
BRUCE NACCARI
Room 2W23, City Hall
New Orleans, Louisiana 70112
(504) 586-5361**

**ATTORNEYS FOR THE
CITY OF
NEW ORLEANS**

**HENRY W. KINNEY, III
JOHN W. ELLINGHAUSEN
639 Loyola Avenue
1100 One Poydras Plaza
New Orleans, Louisiana 70113
(504) 524-0206**

**PHILLIP A. WITTMANN
STEVEN W. USDIN
NOEL J. DARCE
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3200**

**ATTORNEYS FOR THE
AUDUBON PARK COMMISSION**

QUESTION PRESENTED

Is a United States Army Corps of Engineers "nationwide permit" a "license" under the National Historic Preservation Act, 16 U.S.C. Section 470f (1982) requiring a full historic review where the activity qualifying for that nationwide permit is truly "inconsequential"?

LIST OF PARTIES

The Audubon Park Commission and the City of New Orleans adopt the listing of parties to the proceeding included in the Petition for a Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit filed on behalf of the Vieux Carre Property Owners, Residents and Associates, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	7
I. SECTION 470f OF THE NHPA DOES NOT RE- QUIRE A HISTORIC REVIEW OF INCONSE- QUENTIAL ACTIVITIES AND THERE IS NO CONFLICT BETWEEN THE CIRCUITS FOR THIS COURT TO RESOLVE	7
II. THE RIVERFRONT PARK PROJECT WAS COMPLETED AND OPENED ON OCTOBER 20, 1989, THEREBY RENDERING THE ISSUES IN PETITIONER'S WRIT APPLICATION MOOT ...	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:	PAGE
<i>California v. San Pablo & Tulare Railroad</i> , 149 U.S. 308, 13 S. Ct. 876, 37 L. Ed. 747 (1893)	14
<i>City of Romulus v. County of Wayne</i> , 634 F. 2d 347 (6th Cir. 1980)	15
<i>Florida Wildlife Federation v. Goldschmidt</i> , 611 F. 2d 547 (5th Cir. 1980)	14
<i>Friends of the Earth v. Bergland</i> , 576 F. 2d 1377 (9th Cir. 1978)	14
<i>Iron Arrow Honor Society v. Heckler</i> , 464 U. S. 67, 104 S. Ct. 373, 78 L. Ed. 2d 58 (1983)	14
<i>Liner v. Jafco, Inc.</i> , 375 U. S. 301, 84 S. Ct. 391, 11 L. Ed. 2d 347 (1964)	14
<i>Monzillo v. Biller</i> , 735 F. 2d 1456 (D.C. Cir. 1984)	14
<i>Perry v. Commercial Loan Company</i> , 383 U.S. 392, 86 S. Ct. 852, 15 L. Ed. 2d 827 (1966)	12,13
<i>Rector of the Holy Trinity Church v. United States</i> , 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (1892) . .	12
<i>Richland Park Homeowner's Association v. Pierce</i> , 671 F. 2d 935 (5th Cir. 1982)	14
<i>Ringsred v. Duluth, A Minnesota Home Rule Charter City</i> , 828 F. 2d 1305 (8th Cir. 1987)	10,11
<i>Riverside Irrigation District v. Andrews</i> , 758 F. 2d 508 (10th Cir. 1985)	11,12
<i>Save Our Wet Lands, Inc. v. Sands</i> , 711 F. 2d 634 (5th Cir. 1983)	11

TABLE OF AUTHORITIES (continued)

PAGE

STATUTES AND REGULATIONS:

16 U.S.C. § 470f	7
16 U.S.C. § 1536	11
33 U.S.C. § 403	4
33 U.S.C. § 1344	11
33 C.F.R.	
§ 330.1	8
§ 330.5	8,9
1980 U. S. Code Congress and Administrative News 6378	10



IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

NO. 89-563

VIEUX CARRE PROPERTY OWNERS, RESIDENTS &
ASSOCIATES, INC.,

Petitioner,

VERSUS

COLONEL LLOYD KENT BROWN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AUDUBON PARK COMMISSION
AND OF THE CITY OF NEW ORLEANS IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of the Audubon Park Commission and the City of New Orleans in opposition to the petition for a writ of certiorari filed on October 6, 1989. For the reasons set forth below, this application should be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 875 F.2d 453 (5th Cir. 1989) and is reprinted in Petitioner's Appendix at page (1a).¹ The decision of the United States District Court for

¹ Citations to the Appendix ("App.") contained in this brief refer to the Appendix filed with Petitioner's writ application.

the Eastern District of Louisiana is unreported, but is also reprinted in Petitioner's Appendix at page (30a).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on June 14, 1989. A petition for rehearing was denied on July 12, 1989. The jurisdiction of this Court is invoked by the Petitioner under 28 U.S.C. Section 1254(1) (1982).

STATUTES AND FEDERAL REGULATIONS INVOLVED

National Historic Preservation Act, 16 U.S.C. Section 470f.

Rivers and Harbor Act of 1899, 33 U.S.C. Section 403.

33 C.F.R. Part 330 (1988) (U.S. Army Corps of Engineers' Nationwide Permit Regulations).

The statutory and federal regulatory provisions involved are reprinted in the Petitioner's Appendix at page (37a).

STATEMENT OF THE CASE

This suit was instituted in the United States District Court for the Eastern District of Louisiana by the Petitioner, a citizen preservation group, which objected to the construction of an Aquarium and an adjacent Park within the City of New Orleans. The Audubon Park Commission is an independent agency, created by law, which was authorized to plan, construct and operate these two facilities by the Louisiana Legislature.

Construction of the Aquarium itself began on October 29, 1987. It is currently seventy (70%) percent complete and is scheduled to open to the public on September 1, 1990. Construction of the Park was *completed*, and it *opened* to the public on October 20, 1989. The total cost of constructing the Aquarium is twenty-six (26) million dollars. The total cost of the Park was approximately five (5) million dollars.

On July 1, 1986, the Louisiana Legislature authorized the Audubon Park Commission to acquire riverfront property for use in the construction and operation of a riverfront aquarium and a riverfront park. A millage election was held within the City of New Orleans to approve a tax necessary to fund bonds needed for construction, and the necessary millage was approved by the voters of the City of New Orleans with a seventy (70%) percent affirmative vote on November 4, 1986.

The Aquarium and the Riverfront Park are two separate projects located within the boundaries of the Vieux Carre District ("French Quarter"). The sites of these projects are separated from the remainder of the French Quarter by a concrete flood wall, railroad tracks and over twenty (20) acres of parking lots and commercial buildings. The construction of the Aquarium building and the Park required removal of metal sheds that in recent years were used primarily for parking. The Aquarium construction is entirely *landward* of the "ordinary high water line" of the Mississippi River which is the line of demarcation used by the U. S. Army Corps of Engineers (the Corps) to determine the extent of its jurisdiction over navigable waters and its permitting jurisdiction. The Park was constructed by landscaping with trees, green space and benches a part of the Bienville Street Wharf that was also used primarily for parking cars. A twenty-five (25) foot wide strip of the

wharf, adjacent to the river, is reserved for continued maritime use.

The construction of the Park did not change the configuration of the wharf. The surface of the wharf was not enlarged or reduced. It is the same size and shape as before construction, only now it is landscaped. Neither the construction of the Aquarium nor the Park required the removal of or damage to a historic facility. The Bienville Street Wharf, which was constructed in 1930, remains intact.

The constructions of these facilities were studied and approved by the Vieux Carre Commission, the state constitutionally empowered body responsible for overseeing and protecting the historic nature and architecture of the French Quarter. These projects were also approved by the City of New Orleans Planning Commission and by the New Orleans City Council. Neither the construction of the Aquarium or of the Riverfront Park involve any *federal funds or federal property*.

The Corps was aware of the Aquarium and the Riverfront Park from their initial planning stages. When detailed schematic plans of the two projects were available, they were submitted by the Audubon Park Commission to the Corps for review to determine if any permits were needed under the Rivers and Harbor Act of 1899 ("RHA"). Under that Act, the Corps has jurisdiction to review and license any construction that affects "the navigable capacity of any of the waters of the United States." 33 U.S.C. § 403 (1982). On May 14, 1987 the Corps determined that no permit was needed for construction of the *Aquarium* under the Rivers and Harbor Act, because it was being constructed

outside of the Corp's area of jurisdiction. The Corps also determined that no permit was required for the *Park* because it is "located on the presently permitted Bienville Street Wharf and, as such, will require no further action relative to a Department of the Army permit."

In essence, the Corps determined that because the Aquarium was to be constructed outside of the navigable waters of the Mississippi River and would have no effect on the river's navigability, it required no permit. Additionally, because the Park was to be created simply by landscaping the surface of the wharf, without changing the presently existing and permitted wharf structure, it also required no individual permit. Because there were no federal funds, permits or involvement in the Park, there was no need for review under the National Historic Preservation Act ("NHPA").

Petitioner, in addition to filing two state court suits to prevent construction, filed its complaint for mandamus, injunctive and declaratory relief in federal district court on August 6, 1987. The complaint argued, among other issues, that both the Aquarium and the Park required Rivers and Harbor Act permits from the Corps and, as a result, the historic review procedures provided by the NHPA were mandatory before the permits could be issued. On September 21, 1987, the trial court dismissed the complaint, and an appeal subsequently was noticed to the Fifth Circuit. On June 14, 1989, the Fifth Circuit affirmed in part and reversed in part the trial court's ruling and remanded that matter to the trial court for further consideration. The Fifth Circuit treated the Aquarium and Riverfront Park as two separate and distinct projects. 875 F.2d at 455; App. at 3a-4a. The Fifth Circuit held that the Aquarium was outside the Corps' jurisdiction under Section 10 of the Rivers and Harbor Act, 33 U.S.C. § 403, because the Project was

beyond the ordinary high water line of the Mississippi River. 875 F.2d at 461-462; App. at 21a. As a result, no historic review under the NHPA was required for the Aquarium. It also held that the Petitioner had no right of action against the private defendants to enjoin either project, and its only cause of action was against the Corps under the Administrative Procedure Act. 875 F.2d at 458; App. at 9a. The Petitioner has not asked this Court to review these rulings.

With regard to the Park construction only, the Court ruled that "nationwide permits authorizing truly inconsequential activities are not triggering 'licenses' under Section 470f" of the NHPA. 875 F.2d at 465; App. at 25a. It remanded the case to the district court to determine: (1) whether the Park falls within the Corps' nationwide permit regulation found at 33 C.F.R. §330.5(a)(3); (2) if it falls under that regulation, to determine whether the Park is so inconsequential that it escapes historic preservation review and (3) if it escapes historic review, the district court was requested to address issues raised in § 330.5(b)(9) of the Corps' regulations. 875 F.2d at 466; App. at 26a-27a. Trial on these issues is set before the district court on January 24, 1990.

On October 6, 1989, Petitioner filed this writ application on the limited issue of whether, for purposes of the Riverfront Park, a nationwide permit is a "license" subjecting the Park construction to the historical impact review procedures of the NHPA. Although Petitioner continually refers throughout its writ application to both the Aquarium and the Park as the "Aquarium Project", the Fifth Circuit recognized that they are two separate and distinct projects. Petitioner's writ application does not challenge the Fifth Circuit's ruling with regard to the Aquarium. Rather, its claim is limited to the Riverfront

Park and the Fifth Circuit's interpretation of 16 U.S.C. §470f as not requiring a historic review for truly inconsequential activities.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals that the nationwide permit under 33 C.F.R. §330.5, for inconsequential activities, is not a "license" under § 470f of the NHPA is correct. There is no conflict among the circuits on this issue as argued by the Petitioner. The Fifth Circuit followed and did not alter basic rules of statutory construction that have been in effect for at least one hundred years, when it refused to interpret Section 106 of the NHPA in a manner never intended by Congress. Those rules require courts to interpret statutes in a manner that does not lead to absurd and unintended results. Finally, the Park is now complete and open to the public. As a result, this writ application is moot, and there is no need for further review by this Court.

- I. SECTION 470f OF THE NHPA DOES NOT REQUIRE A HISTORIC REVIEW OF INCONSEQUENTIAL ACTIVITIES AND THERE IS NO CONFLICT BETWEEN THE CIRCUITS FOR THIS COURT TO RESOLVE.

Section 470f of the National Historic Preservation Act requires the "head of a federal agency" to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register" before the "issuance of any license." 16 U.S.C. § 470f. The historic review procedures are triggered when a federal agency is *required* to issue a license for an undertaking. The Fifth Circuit held that the Corps' nationwide permit pursuant to 33 C.F.R. § 330.5(a)(3) was not a "license" under § 470f where the nationwide permit

authorizes a "truly inconsequential" activity. 875 F.2d at 465; App. at 25a. The Petitioner argues that the Fifth Circuit's decision is incorrect and conflicts with a 1985 holding of the Tenth Circuit and a 1987 decision of the Eighth Circuit that should be resolved by this Court. No such conflict exists, the position of the Petitioner is without support, and the decision of the Fifth Circuit should be upheld.

The Corps has the authority under the Rivers and Harbor Act to issue permits for activities and constructions that interfere with the navigable waters of the United States. The Corps has recognized through its regulations, however, that a certain class of activities either has no effect on navigability or has such an inconsequential effect that no formal individual permitting should be required. For those activities the Corps has created a "nationwide permit" described as follows:

Nationwide permits are designed to allow certain activities to occur with little, if any, delay or paper work. Nationwide permits are valid only if the conditions applicable to the nationwide permit are met. Failure to comply with a condition does not necessarily mean the activity cannot be authorized but rather that the activity can only be authorized by an individual or regional permit.
33 C.F.R § 330.1.

Some of the activities authorized by a nationwide permit that do not require individual permitting are the placement of navigational aids, fish and wildlife harvesting, (pond nets, crab traps, duck blinds, etc.), staff, tide and water gauges, seismic activities and single boat buoys. 33 C.F.R. Section 330.5. It is unimaginable that Congress intended that the Corps require an individual permit under the RHA, with a full historic review under the NHPA, for a

fisherman to place a crab trap into United States waters or for minor repairs to a wharf. The interpretation of these statutes sought by the Petitioner require that result.

The nationwide permit that the Fifth Circuit determined could apply to the Park authorizes without individual permit:

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for such authorization, provided such repair, rehabilitation or replacement does not result in a deviation from the plans of the original structure of fill. . . 33 C.F.R. § 330.5

The Fifth Circuit did not determine whether the Park was encompassed by this regulation, but remanded that issue to the district court. It also did not determine that all activities allowed by the Corps' nationwide permit program escape historic review, but that only "inconsequential" activities are not encompassed. 875 F.2d at 466; App. at 27a. Further, the Court did not determine that the Park Project was "inconsequential", but remanded that issue to the district court as well. 875 F.2d at 466; App. at 27a.

The only issue presented under this petition is the Fifth Circuit's general determination that Congress never intended to subject truly "inconsequential" activities to the NHPA historic review procedure. 875 F.2d at 466; App. at 27a. The Court's determination of Congressional intent was correct. The NHPA was never intended to mandate a historic review for all activities, however minor. The legislative history of the Historic Preservation Act of 1980

shows that the degree of federal involvement in any project is the key in determining whether review is necessary. It states:

The committee intends that the council take a "reasonable effort" approach in guiding federal agencies in carrying out their preservation responsibilities. This means that the degree of federal involvement in an undertaking and the relation of the involvement to the effects on an historic property should both be considered when an agency determines the actions it will take, or which it requires an applicant to take, to comply with the provisions of this act and its implementing regulations. 1980 U.S. Code Cong. & Admin. News 6378, 6408.

The review required should relate to the federal involvement in the project *and* the relationship of that federal involvement to any effect on historic properties. In this case, the federal involvement with the Park is nonexistent. By merely landscaping the existing wharf structure, the Audubon Park Commission has engaged in an activity that the Corps, through its regulations, has determined is not important enough to merit any significant Corps involvement. The Park construction has no effect on the navigability of the Mississippi River. The work performed is cosmetic only.

The Eighth Circuit has refused to require a historic review when the federal involvement in a project is minimal or inconsequential. *Ringsred v. Duluth, A Minnesota Home Rule Charter City*, 828 F.2d 1305 (8th Cir. 1987). In *Ringsred*, the court refused to require a historic review of a parking facility when the only federal involvement was a required review and approval of contracts relative to the ramp, prior to construction. *Id.* at 1308. The court held that such lack of significant federal involvement does not con-

stitute an "undertaking" under Section 106 of the NHPA requiring a historic review. *Id* at 1309. This is in accord with decisions under the National Environmental Policy Act that state that a private act does not become a major federal action, requiring an environmental review, because of some incidental federal involvement. *See, Save Our Wet Lands, Inc. v. Sands*, 711 F.2d 634 (5th Cir. 1983).

The *Ringsred* decision is not in conflict with the Fifth Circuit's decision in this case, as asserted in the Petitioner's writ application. Both decisions recognize that minor and incidental or "inconsequential" federal involvement in a project is not enough to require a historic review under the NHPA. Likewise, the Tenth Circuit decision cited by the Petitioner does not conflict with the decision in this case. In *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985), the court held that the Corps of Engineers was correct in denying a nationwide permit to a party seeking to deposit dredge material, where the proposed deposit did not meet the requirements of the Corp' nationwide permit regulations. Those regulations required that the proposed discharge not destroy a threatened or endangered species or destroy or modify the habitat of that species. *Id* at 511.

In *Riverside*, the Corps permitting jurisdiction arose under the Clean Water Act. 33 U.S.C. § 1344. There was no historic review at issue but rather an environmental review triggered by the Endangered Species Act ("ESA"). 16 U.S.C. § 1536. The *Riverside* court stated that the ESA required the Corps "to insure that actions authorized, funded or carried out by it do not jeopardize the continued existence of an endangered species." *Id* at 512. The court further stated that under the Clean Water Act (unlike the National Environmental Policy Act) no "major federal

action" was required before the Corps was required to consider environmental impacts of each act it authorizes, both major and minor. *Id* at 513.

The *Riverside* case does not conflict with the Fifth Circuit's decision below. First and foremost, *Riverside* deals with the Clean Water Act and the ESA, as opposed to the Rivers and Harbor Act and the NHPA. The ESA language is very different from that of the NHPA. The ESA requires an agency "to insure" that any of its actions do not jeopardize endangered species. The NHPA only requires the agency to "take into account the effect of the undertaking" on historic sites. There is no conflict between the *Riverside* decision and the decision herein, and there is no division in the circuits for this Court to resolve.

Finally, the Fifth Circuit relied on generally accepted and long held rules of statutory interpretation in reaching its decision. The Petitioner alleges in its application that the Fifth Circuit "substantially broadened the range of circumstances in which a federal court may reject the plain meaning of unambiguous statutory language," by refusing to follow a literal reading of the NHPA when a result unintended by Congress would result. In fact, the Petitioner admits that the courts are free to deviate from the literal language of any statute when the failure to do so would lead to absurd consequences or would contravene legislative intent. This Court has reached that conclusion as well. *Rector of the Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892); *Perry v. Commercial Loan Company*, 383 U.S. 392, 86 S.Ct. 852, 15 L.Ed. 2d 827 (1966). In *Perry*, this court stated:

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, this court has followed that purpose rather than the literal words". *Id.* at 400 (citation omitted).

The Fifth Circuit merely applied this longstanding rule to the NHPA and found that a literal construction would lead to unreasonable and unintended results when applied to "inconsequential" activities. The court made no ruling as to whether the Park was inconsequential; that issue is on remand to the district court.

The Petitioner's interpretation of the NHPA as requiring a review in this instance leads to absurd or unintended results. It would require a historical review when a fisherman sets a crab trap in a river or drops a single mooring buoy. It would also require a historic review for painting or repairing an existing wharf. It would require a review, as in this case, for planting grass or placing potted plants and benches on a wharf. Such a result is absurd, unintended by Congress and should not be adopted by this Court. The Fifth Circuit has not broadened the rules of statutory construction in any way, and no reason to review its ruling exists.

II. THE RIVERFRONT PARK PROJECT WAS COMPLETED AND OPENED ON OCTOBER 20, 1989, THEREBY RENDERING THE ISSUES IN PETITIONER'S WRIT APPLICATION MOOT .

It is well settled that "federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 104 S.Ct. 373, 374, 78 L.Ed.2d 58 (1983). Article III prohibits federal courts from issuing advisory opinions. As this Court has stated on numerous occasions, we are "not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before [us]." *California v. San Pablo & Tulare Railroad*, 149 U.S. 308, 314, 13 S.Ct. 876, 878, 37 L.Ed. 747 (1893).

In general, a case becomes moot when the activities for which an injunction is sought have already occurred and cannot be undone. *Florida Wildlife Federation v. Goldschmidt*, 611 F.2d 547 (5th Cir. 1980); *Richland Park Homeowner's Association v. Pierce*, 671 F.2d 935 (5th Cir. 1982); *Friends of the Earth v. Bergland*, 576 F.2d 1377 (9th Cir. 1978); and *Monzillo v. Biller*, 735 F.2d 1456 (D.C. Cir. 1984). For example, in *Goldschmidt*, the plaintiffs sought to enjoin the funding and construction of a portion of an interstate highway on the basis of noncompliance with the environmental impact statement requirement of the National Environmental Policy Act. The Fifth Circuit held that the issue had become moot while on appeal because the only portion of the highway sought to be enjoined and for which no impact statement was prepared *was substantially completed*. The court noted that a substantial

amount of property had already been acquired around the route selected for the construction and that for those limited portions of the highway which were not completed, impact statements or their functional equivalent had been prepared. Further, the highway was nearly finished, and the vast majority of families had been relocated and businesses reestablished. The court went on to hold that the action was moot on the grounds that the activity sought to be enjoined had already substantially occurred and the judiciary could not undo what had already been done. The court remanded the case to the district court to be dismissed as moot.

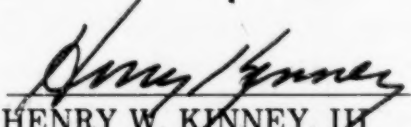
In this case, the Park was completed and opened to the public on October 20, 1989. Petitioner's writ application is now moot, and any injunctive relief would be futile. *City of Romulus v. County of Wayne*, 634 F.2d 347 (6th Cir. 1980). Therefore, this Court should find that the issue involved in this case is now moot and there is no occasion for further review by this Court.

CONCLUSION

For the reasons set forth above, the Audubon Park Commission and the City of New Orleans submit that Petitioner's Application for Writ of Certiorari should be denied.

NEW ORLEANS, LOUISIANA, this 2nd day of November, 1989.

PHILLIP A. WITTMANN
STEVEN W. USDIN
NOEL J. DARCE
STONE, PIGMAN, WALTHER
WITTMANN & HUTCHINSON
546 Carondelet Street


HENRY W. KINNEY, III
JOHN W. ELLINGHAUSEN
639 Loyola Avenue
1100 One Poydras Plaza
New Orleans, Louisiana 70113
(504) 524-0206

ATTORNEYS FOR THE AUDUBON PARK COMMISSION

OKLA JONES, II
ELEANORE K. ROMER
BRUCE NACCARI
Room 2W23, City Hall
New Orleans, Louisiana 70112
(504) 586-4651

ATTORNEYS FOR THE CITY OF NEW ORLEANS

No. 89-563

2

Supreme Court, U.S.

FILED

DEC 8 1989

JOSEPH F. SPANIOL, JR.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

**VIEUX CARRE PROPERTY OWNERS, RESIDENTS
& ASSOCIATES, INC., PETITIONER**

v.

COLONEL LLOYD KENT BROWN, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

KENNETH W. STARR

Solicitor General

GEORGE VAN CLEVE

Acting Assistant Attorney General

MARTIN W. MATZEN

ELIZABETH ANN PETERSON

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

12 pp

QUESTION PRESENTED

Whether federal undertakings subject to the historical comment requirement of the National Historic Preservation Act, 16 U.S.C. 470f, include "truly inconsequential activities" authorized by a nationwide permit promulgated by the Army Corps of Engineers.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	- 8

TABLE OF AUTHORITIES

Cases:

<i>American Construction Co. v. Jacksonville, T.&K.W.R.R.</i> , 148 U.S. 372 (1893)	5
<i>Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.</i> , 389 U.S. 327 (1967)	5
<i>Cohen v. Beneficial Loan Corp.</i> , 337 U.S. 541 (1949)	6
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974)	6
<i>Gillespie v. United States Steel Corp.</i> , 379 U.S. 148 (1964)	6
<i>Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.</i> , 240 U.S. 251 (1916)	5
<i>Public Citizen v. U.S. Dep't of Justice</i> , 109 S. Ct. 2558 (1989)	7
<i>Ringsred v. City of Duluth, A Minnesota Home-Rule Charter City</i> , 828 F.2d 1305 (8th Cir. 1987) ..	7
<i>Riverside Irrigation District v. Andrews</i> , 758 F.2d 508 (10th Cir. 1985)	8
<i>United States v. General Motors Corp.</i> , 323 U.S. 373 (1945)	6

Statutes and regulations:

Endangered Species Act, 16 U.S.C. 1536(a)(3) ..	8
National Environmental Policy Act, 42 U.S.C. 4332(C)	8

IV

Statutes and regulations — Continued:

Page

National Historic Preservation Act, 16 U.S.C. 470

et seq.:

16 U.S.C. 470f 3-4, 5, 7

16 U.S.C. 470h-2(f) 5

Rivers and Harbors Appropriation Act of 1899, 33

U.S.C. 403 2, 4

33 C.F.R.:

Section 330.1 2

Section 330.5 4

Section 330.5(a) 3

Section 330.5(b)(9) 4

Miscellaneous:

H.R. Rep. No. 1457, 96th Cong., 2d Sess.

(1980) 7

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-563

VIEUX CARRE PROPERTY OWNERS, RESIDENTS
& ASSOCIATES, INC., PETITIONER

v.

COLONEL LLOYD KENT BROWN, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-27a, is reported at 875 F.2d 453. The order and reasons of the district court, Pet. App. 30a-36a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1989. A petition for rehearing was denied on July 12, 1989. Pet. App. 28a-29a. The petition for writ of certiorari was filed on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an organization whose members own land within the Vieux Carre National Historic Landmark

District (the French Quarter) in New Orleans, Louisiana. Petitioner filed this lawsuit to prevent respondent Audubon Park Commission from building an aquarium and riverfront park at the foot of Bienville Street in that district. Pet. App. 1a-2a.

Before construction began, the Audubon Park Commission submitted its plans to the Army Corps of Engineers for the Corps's determination whether a permit is required under the Rivers and Harbors Act, 33 U.S.C. 403.¹ The Corps determined that construction of the aquarium does not require a permit because that structure would be located landward of the ordinary high water line and is therefore outside the Corps's jurisdiction. The Corps found that the riverfront park, although riverward of the ordinary high water line and therefore within the Corps's jurisdiction, is authorized by a nationwide Corps permit so that it, too, does not require an individual permit.² Pet. App. 3a-4a.

¹ Section 403 of the Rivers and Harbors Act prohibits the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." That Section also prohibits construction and certain other activities in the waters of the United States unless those activities are pursuant to plans recommended by the Army Corps of Engineers and authorized by the Secretary of the Army.

² A nationwide permit is a regulation that authorizes activities subject to the jurisdiction of the Corps of Engineers. If the proposed project meets the criteria of a nationwide permit, it may be undertaken without individual approval by the Corps. See 33 C.F.R. 330.1.

The Corps's regulations include several nationwide permits for enumerated categories of activities. Among the categories of activities for which a nationwide permit has been promulgated is:

- (3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill, or of any currently serviceable structure or fill constructed prior to the requirement for authorization, provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure or fill, and further provided that the structure

2. The district court dismissed petitioner's action in its entirety. It held that petitioner did not have a private right of action against any of the non-federal respondents and that petitioner could not obtain judicial review of the Corps's determinations because they were "committed to agency discretion by law." Pet. App. 33a-36a.

3. The court of appeals affirmed that part of the district court's judgment dismissing petitioner's claims against the non-federal respondents, but it reversed the district court's judgment insofar as it held that the Corps's determinations were not subject to judicial review. Pet. App. 5a-9a & n.1. The court of appeals then reviewed the Corps's determinations that the aquarium and riverfront park projects do not require permits and do not trigger the historical comment requirement of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f.³

or fill has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted. * * *

33 C.F.R. 330.5(a). The Corps determined that construction of the riverfront park in this case is authorized by the nationwide permit quoted above because the placement of sod, trees, and benches would involve only minimal structural rehabilitation and would not interfere with any current use of the wharf. Pet. App. 4a.

³ Section 470f of the National Historic Preservation Act requires an agency that has "authority to license" an "undertaking" to "afford the Advisory Council on Historic Preservation * * * a reasonable opportunity to comment with regard to such undertaking." That Section provides in full as follows:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the under-

With respect to the aquarium, the court of appeals held that no permit is required and that no historical comment is necessary. The Corps determined that construction of the aquarium would not constitute an obstruction or otherwise affect navigable capacity within the meaning of the Rivers and Harbors Act, 33 U.S.C. 403 (see note 1, *supra*), and the court of appeals concluded that the Corps's jurisdictional determination was not arbitrary or capricious. Pet. App. 17a-21a.

With respect to the riverfront park, however, the court of appeals remanded to the district court. Pet. App. 27a. The court of appeals held that "nationwide permits authorizing truly inconsequential activities are not triggering 'licenses' under section 470f." Pet. App. 25a. But because the district court had not determined whether the park project is authorized by the nationwide permit, 33 C.F.R. 330.5, the court of appeals remanded for that determination. The remand instructions further provide that even if the district court determines that the park is covered by the nationwide permit, it must still determine whether the park project is sufficiently "inconsequential" that it is not subject to the historical comment provision of the NHPA. Pet. App. 26a. Finally, the remand instructions require the district court to address petitioner's argument that the Corps neglected to evaluate the park's impact on historic properties as required by its own regulation, 33 C.F.R. 330.5(b)(9). Pet. App. 26a.

taking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

ARGUMENT

Petitioner renews its contention that the proposal to build a riverfront park should have been submitted for comment as to its impact on the preservation of historical properties under Section 470f of the NHPA.⁴

1. This case no longer presents a live case or controversy. Petitioner claimed that Section 470f of the NHPA required the Army Corps of Engineers to provide the Advisory Council on Historic Preservation a "reasonable opportunity to comment" on the effect of the riverfront park on the historic district. 16 U.S.C. 470f. See 16 U.S.C. 470h-2(f). Petitioner alleged no property or other substantive right to prevent construction of the park on the Bienvenue Street Wharf. Nor does it claim in this Court any civil damages remedy for construction completed in violation of the historical comment requirement. Because the remedy for petitioner's claim is a declaration that the Corps must submit the park project for historic comment, the completion of that project while this case was on appeal means that declaratory relief can no longer be provided and makes this case moot. See *Audubon Park Commission and the City of New Orleans Br. in Opp.* 15.

2. Even if this case were not moot, the absence of a final judgment would make review by this Court premature. This Court does not review interlocutory decisions "except in extraordinary cases." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *American Construction Co. v. Jacksonville, T.&K.W.R.R.*, 148 U.S. 372, 384 (1893). Accordingly, this Court has generally confined interlocutory review to cases involving important and clearly defined issues

⁴ Petitioner no longer claims that plans to construct the aquarium should have been submitted for historical comment.

fundamental to the subsequent conduct of the case, see, *e.g.*, *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964), or a determination of rights separate from and collateral to rights asserted in the action, see, *e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-172 (1974); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).

The review petitioner seeks does not qualify under either of those exceptions. Resolution of the question whether all possible activities — even “truly inconsequential” ones — are subject to the NHPA is not necessary for the district court to follow its remand instructions. Furthermore, the NHPA claim petitioner presses in this Court is not collateral to the NHPA claim it retains in the district court on remand; both claim that the Corps should have submitted the park project for comment on its effect on the preservation of historic properties.

Review at this stage of the proceedings would be particularly premature because the court of appeals did not specifically identify those “truly inconsequential activities” that are not subject to the NHPA. Were the case not moot, the scope of this phrase and its application here would be determined in the first instance by the district court on remand. Thus, under the remand order in this case, it is possible that petitioner would have prevailed with respect to the park project at issue. In any event, this Court’s review would have been more appropriate after further consideration and definition of the court of appeals’ legal standard and application of that standard to the facts of this case.

3. Moreover, the court of appeals’ decision is correct and does not conflict with the decision of any other court. Because the court of appeals has not yet determined whether the park project challenged in this case is “truly inconsequential” and therefore not subject to the NHPA, petitioner’s claim at this juncture is necessarily that every

activity subject to the Corps's jurisdiction under the Rivers and Harbors Act — no matter how trivial — must be reviewed for its historical impact under the NHPA.

Section 470f of the NHPA, however, does not rescind the doctrine *de minimis non curat lex* — the law does not concern itself with trifles. To the contrary, that Section requires an opportunity for historical comment only with respect to a federal “undertaking,” and the legislative history of that undefined term suggests that “the degree of Federal involvement in an undertaking and the relation of that involvement to the effects on an historic property should both be considered” in determining what actions comply with the NHPA, H.R. Rep. No. 1457, 96th Cong., 2d Sess. 45 (1980). Under petitioner’s construction of the NHPA, every activity subject to the Corps’s jurisdiction under the Rivers and Harbors Act would have to be submitted for historical comment regardless of that activity’s potential effect on the preservation of historic properties. Petitioner’s construction would flood the Advisory Council on Historic Preservation with trivial requests for comment that would inevitably dilute the effectiveness of the Council’s review. Section 470f does not require, and should not be construed to require, that counterproductive result. Cf. *Public Citizen v. U.S. Dep’t of Justice*, 109 S. Ct. 2558 (1989) (interpreting similarly undefined statutory term “utilized”).

The courts of appeals are not divided on the meaning of Section 470f of the NHPA. Indeed, none appears to have articulated a legal standard for applying Section 470f. In *Ringsred v. City of Duluth, A Minnesota Home-Rule Charter City*, 828 F.2d 1305 (1987), the Eighth Circuit noted only that “[t]he parties treat NHPA’s ‘undertaking’ requirement as essentially coterminous with NEPA’s ‘major Federal actions’ requirement.” *Id.* at 1309 (emphasis added). Without offering its own definition of that term, the Eighth Circuit held that a parking ramp project that was “not subject to

any federal licensing” fell outside the scope of the NHPA. 828 F.2d 1308-1309. The Tenth Circuit’s decision in *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (1985), is even further afield. In that case, the Tenth Circuit refused to cross-apply National Environmental Policy Act cases (that Act authorizes government action only when there is a “major Federal action[],” 42 U.S.C. 4332(C)), to the case before it involving the Endangered Species Act (ESA) (which requires consultation “on any prospective agency action,” 16 U.S.C. 1536(a)(3)). 758 F.2d at 513. *Riverside* did not construe the NHPA; the operative language of the ESA and the NHPA differ materially (the former applies to “action[s]” while the latter applies to “undertaking[s]”); and even with respect to the ESA the Tenth Circuit did not apply it to “truly inconsequential” actions because that question was not before it. No conflict divides the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

GEORGE VAN CLEVE
Acting Assistant Attorney General

MARTIN W. MATZEN
ELIZABETH ANN PETERSON
Attorneys

DECEMBER 1989

No. 89-563

Supreme Court, U.S.

FILED

DEC 20 1989

JOSEPH P. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

VIEUX CARRE PROPERTY OWNERS, RESIDENTS
AND ASSOCIATES, INC.,

Petitioner,
v.

COLONEL LLOYD KENT BROWN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

JOHN H. BEISNER

Counsel of Record

STUART L. FULLERTON

O'MELVENY & MYERS

555 13th Street, N.W.

Washington, D.C. 20004-1109

(202) 383-5300

JAMES G. DERBES

DERBES & WALDRUP

Suite 318

610 Poydras Street

New Orleans, LA 70130

(504) 525-9538

JAMES R. LOGAN IV

650 Poydras Street

2850 Poydras Center

New Orleans, LA 70130

(504) 524-7604

Counsel for Petitioner



TABLE OF AUTHORITIES

CASES:	Page
<i>Church of the Holy Trinity v. United States</i> , 143 U.S. 457 (1892)	1
<i>Colorado River Indian Tribes v. Marsh</i> , 605 F. Supp. 1425 (C.D. Cal. 1985)	3
<i>Columbia Basin Land Protection Ass'n v. Schlesinger</i> , 643 F.2d 585 (9th Cir. 1981)	3
<i>Land v. Dollar</i> , 330 U.S. 731 (1947)	3
<i>Larson v. Domestic & Foreign Commerce Corp.</i> , 337 U.S. 682 (1949)	3
<i>Ringsred v. City of Duluth</i> , 828 F.2d 1305 (8th Cir. 1987)	6
<i>Riverside Irrigation Dist. v. Andrews</i> , 758 F.2d 508 (10th Cir. 1985)	6
<i>United States v. Cumberland Farms of Connecticut, Inc.</i> , 826 F.2d 1151 (1st Cir. 1987), cert. denied, 108 S. Ct. 1016 (1988)	3
<i>United States v. General Motors Corp.</i> , 323 U.S. 373 (1945)	3
<i>Van Abbema v. Fornell</i> , 807 F.2d 633 (7th Cir. 1986)	3
STATUTES AND FEDERAL REGULATIONS:	
National Historic Preservation Act, 16 U.S.C. §§ 470 to 470W-6 (1982 & Supp. V 1987) :	
16 U.S.C. § 470f (1982)	<i>passim</i>
16 U.S.C. § 470h-2(d) (1982)	7
16 U.S.C. § 470h-2(f) (1982)	7
National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1982)	6
33 C.F.R.	
§ 325.7 (1988)	2
§ 330.5(b)(9) (1988)	2
§ 330.11 (1988)	2
36 C.F.R.	
§ 800.2(c) (1988)	3
§ 800.2(o) (1988)	5, 6
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 1457, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. Code Cong. & Admin. News 6378	5

CLASS

YOUNG

ENCLOSURE MATERIALS
U.S. Dept. of State
Washington, D.C.
20547-0001
6325

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-563

VIEUX CARRE PROPERTY OWNERS, RESIDENTS
AND ASSOCIATES, INC.,

Petitioner,

v.

COLONEL LLOYD KENT BROWN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

The Federal Respondents' Brief in Opposition is most remarkable for its failure to address the fundamental issue presented by the pending petition: May a federal court disregard what it concedes to be the "literal construction" of a federal statute in favor of a contrary interpretation with purportedly "great practical appeal?" (Pet. App. 24a-25a (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).) Instead of defending the merits of the court of appeals' ruling that section 470f of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f (1982), which requires federal agencies to consider the effect of "any" federally licensed activities on historic properties, applies only to certain types of federally licensed activities (Pet. App. 25a), the Federal Respondents resort primarily to meritless procedural objections designed to divert attention

from the far-reaching implications of the Fifth Circuit's NHPA interpretation:

1. Without verification, the Federal Respondents assert that the pending petition is moot because the park portion of the challenged Aquarium Project was completed "while this case was on appeal" and "declaratory relief [therefore] can no longer be provided." (Fed. Br. in Opp. at 5.) This representation cannot be squared with the Federal Respondents' acknowledgment in papers filed with the U.S. District Court for the Eastern District of Louisiana several days ago that the park is at most "substantial[ly] complet[e]." In reality, construction continues on portions of the park, and large sections have not been opened to the public.¹

Assuming *arguendo* that a portion of the challenged project is complete, however, a live case or controversy nevertheless remains. Even after a project developed pursuant to an Army Corp permit (including a nationwide permit) is finished, the Corps retains authority to order changes to the project through modification, suspension or revocation of the permit. See 33 C.F.R. §§ 325.7, 330.5(b)(9), 330.11(c) (1988). Thus, a section 470f historic review could still yield conditons on the applicable permit that would mitigate the adverse impacts of the project on the Vieux Carre National Historic Landmark District.² For example, the Army Corps could re-

¹ Moreover, only five days ago, local officials announced plans for further expansion and development of the park. See The [New Orleans] Times-Picayune, Dec. 15, 1989, at 1.

² The Federal Respondents are incorrect in asserting that "[p]etitioner no longer claims that plans to construct the aquarium should have been submitted for historical comment." (Fed. Br. in Opp. at 5 n.4.) Even assuming that no individual permit is required for the Aquarium phase of the project, the Corps' NHPA obligations in permitting the riverfront park phase are not limited to the construction activity on only that portion of the project site. To the contrary, the Corps is required to consider not only the effects of the construction of the riverfront park, but also the ef-

quire additional plans for landscaping, parking, or traffic control measures in an effort to diminish the harm that the project will cause to the historic district. In sum, completion of the park phase of the project clearly would not deprive the district court of the ability to fashion effective relief. *See, e.g., United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151, 1161-65 (1st Cir. 1987) (affirming grant of Army Corps' request for injunction requiring defendant to restore wetland drained without permit), *cert. denied*, 108 S. Ct. 1016 (1988); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981) (fact that power transmission line had been operating for several years "does not moot the claim [under NEPA] that it *should not be* operating in its present location") (emphasis in original); *Van Abbema v. Fornell*, 807 F.2d 633, 636 (7th Cir. 1986) (challenge to Army Corps' permit for coal loading facility not mooted by completion of facility because court "presumably could order that the facility be dismantled, altered or operated differently").

2. This Court's review of the Fifth Circuit's erroneous construction of section 470f would not be "premature." (Fed. Br. in Opp. at 6.) As the Federal Respondents acknowledge (*id.*), this Court has not hesitated to review decisions of the courts of appeals which are "fundamental to the further conduct of the case," regardless of the status of the proceedings. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

facts of the entire Aquarium Project on the Vieux Carre National Historic Landmark District. *See* 36 C.F.R. § 800.2(c) (1988); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1438 (C.D. Cal. 1985) (under the NHPA, the Army Corps must consider the effects not only in the "permit area," but in the "affected area" as well).

It is difficult to imagine an issue more fundamental to the pending remand proceedings than the question presented for review. If the Fifth Circuit erred in concluding that an "inconsequentiality" exception should be applied in determining whether a federally permitted project should be subjected to section 470f historic review, the remand proceedings will be governed by an erroneous legal standard. And more importantly, if petitioner is correct in arguing that *all* federally permitted projects must be submitted for historic review, there is no need for remand at all because the parties agree that a federal permit (*i.e.*, an Army Corps nationwide permit) authorized the challenged project. (*See* Pet. App. 23a-24a.)

3. The Federal Respondents' argument that the "inconsequentiality" exception which the Fifth Circuit wrote into section 470f is supported by the statute's terms and legislative history is plainly without merit. The Federal Respondents misleadingly state that section 470f "requires an opportunity for historical comment only with respect to a federal 'undertaking.'" (Fed. Br. in Opp. at 7.) The Fifth Circuit itself acknowledged that the plain language of section 470f requires an advance historic impact review not only of "federal 'undertaking[s],'" but also of "any license" issued by a federal agency for a private "undertaking."³ (Pet. App. 24a.) As noted previously, the Federal Respondents concede that the park portion of the Aquarium Project is authorized by an Army Corps nationwide permit, a type of federal license.

The Federal Respondents' argument that the Fifth Circuit's "inconsequentiality" exception is somehow supported by the legislative history of the NHPA (Fed. Br. in Opp. at 7) is also spurious. Reference to the legisla-

³ In relevant part, section 470f states: "the head of any Federal department or independent agency having authority to license *any* undertaking, shall . . . prior to the issuance of *any* license . . . take into account the effect of the undertaking on any historic district" 16 U.S.C. § 470f (1982) (*emphasis added*).

tive history is unnecessary because, as the Fifth Circuit observed, the terms of section 470f are not ambiguous. (See Pet. App. 24a-25a). In any event, the language Respondents quote from the legislative history of the 1980 amendments to the NHPA, H.R. Rep. No. 1457, 96th Cong., 2d Sess. 37, 45, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6408, does not support an exception for "inconsequential" activities. That passage merely suggests that the degree of federal involvement in a project may affect the nature of the mitigation measures the Advisory Council must consider in its section 470f review and makes no suggestion that the degree of federal involvement affects the determination whether section 470f requires historic review in the first place. In fact, the full paragraph from which Federal Respondents quote makes clear that the historic review requirements of section 470f are to be broadly applied.⁴

Equally unfounded is the Federal Respondents' argument that the equitable doctrine of *de minimus non curat lex* requires federal courts to write "inconsequentiality"

⁴ The full paragraph of legislative history relied upon by the Federal Respondents states:

[t]he Committee also notes that the term "undertaking," as it is used in other sections of the Act, is meant to be used in the same context as described in Section [470f]. The Advisory Council on Historic Preservation has adopted an acceptable definition within its regulations, published as 36 CFR 800. [Those regulations broadly construe the term "undertaking" to "mean[] any project, activity, or program that can result in changes in the character or use of historic properties." 36 C.F.R. § 800.2(o) (1988).] The Committee intends that the Council take a "reasonable effort" approach in guiding Federal agencies in carrying out their preservation responsibilities. This means that the degree of Federal involvement in an undertaking and the relation of that involvement to the effects on historic property should both be considered when an agency determines the actions it will take, or which it requires an applicant to take, to comply with the provisions of this Act and its implementing regulations.

exceptions into the NHPA and other statutes. (Fed. Br. in Opp. at 7.) This doctrine has never been applied by this or any other federal court in the manner proposed by the Federal Respondents. Where Congress has seen fit to impose threshold requirements to curtail the reach of legislation (particularly environmental impact laws), it has done so expressly.⁵ Moreover, existing federal regulations of the Advisory Council on Historic Preservation already ensure that licenses or federal undertakings posing only "inconsequential" impacts on historic properties are not subject to section 470f review. Under those regulations, review obligations are limited to only those activities that by their nature "can result in changes in the character or use of historic properties." 36 C.F.R. § 800.2(o) (1988).⁶ In this case, federal respondents have never contested the proposition that building a major project in the midst of the Vieux Carre National Historic Landmark District could "result in changes in the character or use" of that historic district.

Finally, Respondents' efforts to ignore the split among the circuits on the question presented is highly disingenuous. The Fifth Circuit expressly recognized the conflicting interpretations set forth by the Eighth and Tenth Circuits in *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), and *Riverside Irrigation Dist v. Andrews*, 758 F.2d 508 (10th Cir. 1985), and deliberately opted for a third, conflicting interpretation of what triggers the NHPA's historic review requirements. (Pet. App. 13a, 23a-25a.) Respondents and Petitioners relied

⁵ See, e.g., National Environmental Policy Act, 42 U.S.C. § 4332 (2)(C) (1982) (limiting environmental impact requirements to "major Federal actions significantly affecting the quality of the human environment").

⁶ Thus, contrary to Respondents' suggestion, a nationwide permit authorizing placement of temporary buoys or crab and lobster traps would not be subject to section 470f historic impact review because historic properties could not even potentially be affected by such activities.

heavily upon *Ringsred* and *Andrews*, respectively, as controlling precedent in the proceedings below, and Respondents should not now be heard to say that these cases are irrelevant.

CONCLUSION

If the Fifth Circuit's interpretation of section 470f is allowed to stand, Congress' command that federal agencies assume responsibility for the effects of their licensed activities on historic properties will be largely countermanded. See 16 U.S.C. §§ 470f, 470h-2(d), 470h-2(f) (1982). As a result, hundreds of historic properties may be thoughtlessly damaged or destroyed. Given the importance of this issue to the continuing vitality of Congress' historic preservation mandate and the Federal Respondents' apparent disinclination to defend the Fifth Circuit's decision on the merits, a writ of certiorari should issue.

Respectfully submitted,

JOHN H. BEISNER

Counsel of Record

STUART L. FULLERTON

O'MELVENY & MYERS

555 13th Street, N.W.

Washington, D.C. 20004-1109

(202) 383-5300

JAMES G. DERBES

DERBES & WALDRUP

Suite 318

610 Poydras Street

New Orleans, LA 70130

(504) 525-9538

JAMES R. LOGAN IV

650 Poydras Street

2850 Poydras Center

New Orleans, LA 70130

(504) 524-7604

Counsel for Petitioner

No. 89-563

3

Supreme Court, U.S.

FILED

DEC 9 1989

JOSEPH E. SPANOL, JR.,

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VIEUX CARRE PROPERTY OWNERS, RESIDENTS
& ASSOCIATES, INC.,

Petitioner,

v.

COLONEL LLOYD KENT BROWN, *et. al.*,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

**BRIEF OF THE NATIONAL TRUST FOR HISTORIC
PRESERVATION IN THE UNITED STATES,
AS AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI**

DAVID A. DOHENY

General Counsel

ELIZABETH S. MERRITT

(Counsel of Record)

ANDREA C. FERSTER

Assistant General Counsel

National Trust for

Historic Preservation

in the United States

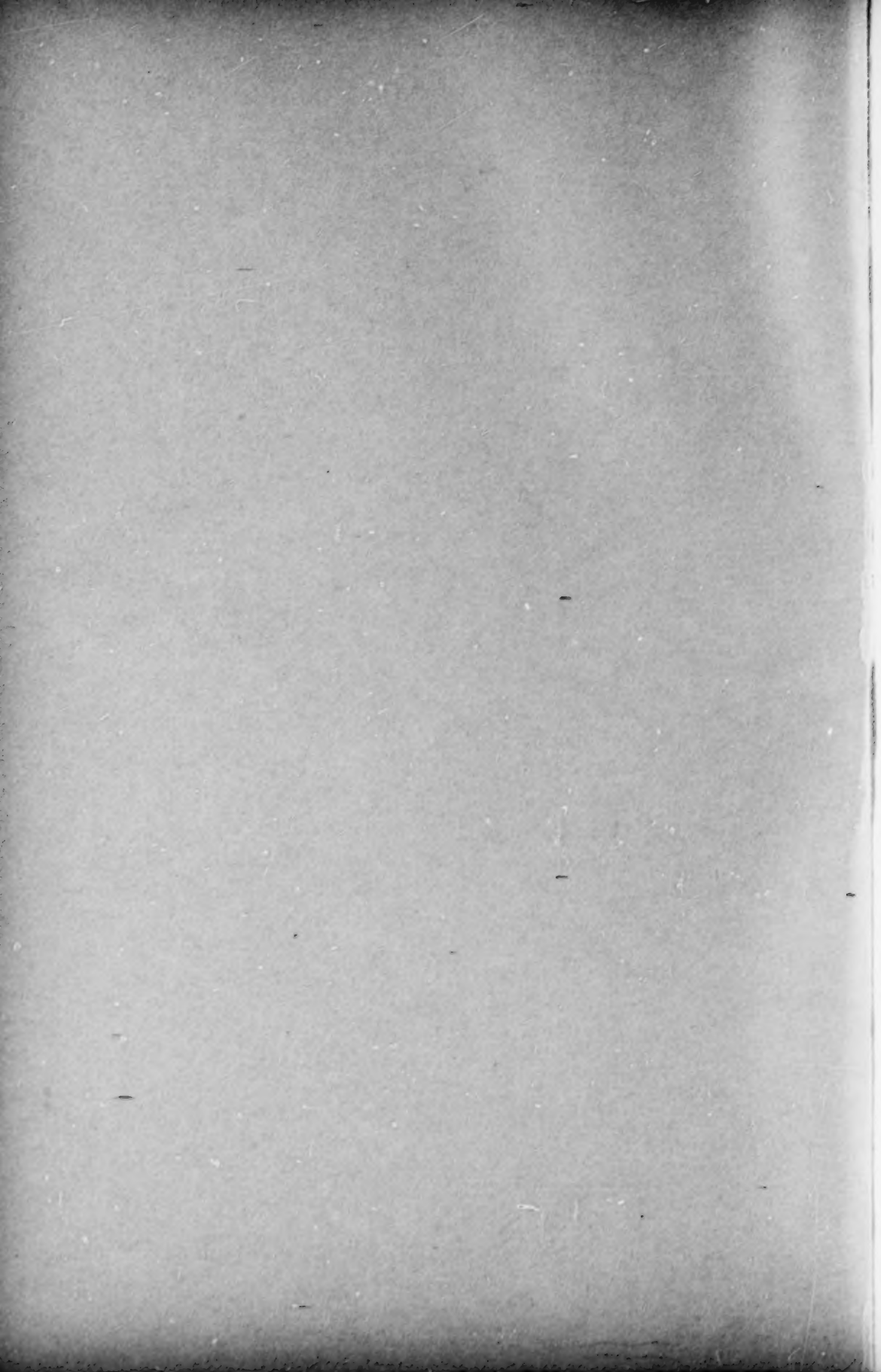
1785 Massachusetts Avenue, N.W.

Washington, D.C. 20036

(202) 637-4035

Counsel for Amicus Curiae

3082



QUESTIONS PRESENTED

Are federal agencies authorized to exempt themselves from the broad statutory mandate of the National Historic Preservation Act by the regulatory adoption of abbreviated permitting procedures, created solely for purposes of administrative convenience?

Does this Court's decision in *California v. Sierra Club*, 451 U.S. 287 (1981), preclude the joinder of non-federal defendants acting under authority of a federal permit, where joinder is necessary to provide complete relief under the National Historic Preservation Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	7
I. The Fifth Circuit's Decision Creates a Conflict Among the Circuits as to Whether Federal Agencies may Exempt Themselves From Compliance with Mandatory Environmental Review Statutes	7
A. Section 106 Applies to All Agency Authorized Activities, No Matter How "Inconsequential," Which Could Result in Changes to the Character or Use of Historic Properties	9
B. The Exception Created by the Fifth Circuit Is Not Necessary to Prevent "Absurd" Results, and Is Contrary to Established Principles of Administrative Procedure	11
II. The Decision Below Precluding Joinder of Non-Federal Defendants Acting Pursuant to a Federal Permit Creates a Split in the Circuits That Undermines the Enforcement Mechanism Designed by Congress to Protect Historic Properties	16
A. The Fifth Circuit's Dismissal of the Non-Federal Defendants was Wrong, and Conflicts with the Decisions of the Ninth and Tenth Circuits	16

B. Joinder of the Non-federal Permittees Is Necessary in Order to Afford Complete Relief to Plaintiffs	19
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
<i>Aertson v. Landrieu</i> , 488 F. Supp. 314 (D. Mass.), aff'd, 637 F.2d 12 (1st Cir. 1980)	11
<i>American Maritime Ass'n v. United States</i> , 766 F.2d 545 (D.C. Cir. 1985)	14
<i>Bywater Neighborhood Ass'n v. Tricarico</i> , 879 F.2d 165 (5th Cir. 1989), petition for cert. filed, 58 U.S.L.W. ____ (U.S. Dec. 6, 1989) (No. 89- 898)	16,19
<i>California v. Sierra Club</i> , 451 U.S. 287 (1981) ...	3,18,19
<i>Colorado River Indian Tribes v. Marsh</i> , 605 F. Supp. 1425 (C.D. Cal. 1985)	5,20
<i>Friends of Sierra R.R., Inc. v. ICC</i> , 881 F.2d 663 (9th Cir. 1989), petition for cert. filed sub nom., <i>Tuolumne Park & Recreation Dist. v. ICC</i> , 58 U.S.L.W. 3336 (U.S. Oct. 30, 1989) (No. 89- 701)	16
<i>Jones v. Gordon</i> , 792 F.2d 821 (9th Cir. 1986)	15
<i>League to Save Lake Tahoe v. Tahoe Regional Plan- ning Agency</i> , 558 F.2d 914 (9th Cir. 1977)	17,18
<i>NLRB v. Baptist Hospital</i> , 442 U.S. 773 (1979) ...	14
<i>NLRB v. Beth Israel Hospital</i> , 437 U.S. 483 (1978)	14
<i>National Center for Preservation Law v. Landrieu</i> , 496 F. Supp. 716 (D.S.C.), aff'd per curiam, 635 F.2d 324 (4th Cir. 1980)	12
<i>National Tourbrokers Ass'n v. ICC</i> , 671 F.2d 528 (D.C. Cir. 1982)	15
<i>National Trust for Historic Preservation v. U.S. Army Corps of Engineers</i> , 552 F. Supp. 784 (S.D. Ohio 1982)	12,20
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945)	14

Table of Authorities Continued

	Page
<i>Ringsred v. City of Duluth</i> , 828 F.2d 1305 (8th Cir. 1987)	11
<i>Riverside Irrigation District v. Andrews</i> , 758 F.2d 508 (10th Cir. 1985)	8,10-11
<i>Sierra Club v. Hodel</i> , 848 F.2d 1068 (10th Cir. 1988)	17,18
<i>Steamboaters v. FERC</i> , 759 F.2d 1382 (9th Cir. 1986)	15
<i>Township of Lower Alloways Creek v. Public Service Electric & Gas Co.</i> , 687 F.2d 732 (3d Cir. 1982)	15
Statutes	
Administrative Procedure Act ("APA")	
5 U.S.C. § 553	14
Historic Sites Act of 1935	
16 U.S.C. §§ 461-467	2
National Trust for Historic Preservation Charter	
16 U.S.C. § 468	2
National Historic Preservation Act ("NHPA")	
16 U.S.C. §§ 470 <i>et seq</i>	2
16 U.S.C. § 470	2,3
16 U.S.C. § 470(b)	4
16 U.S.C. § 470-1	3
16 U.S.C. § 470a(a)	3
16 U.S.C. § 470f	<i>passim</i>
16 U.S.C. § 470h-2(f)	3,9
16 U.S.C. § 470i(a)(8)	2
16 U.S.C. § 470j	2
16 U.S.C. § 470s	2,12
16 U.S.C. § 470w-4	20

Table of Authorities Continued

	Page
Endangered Species Act	
16 U.S.C. §§ 1531 <i>et seq</i>	10
16 U.S.C. § 1536(a)(3)	10
Rivers and Harbors Act ("RHA")	
33 U.S.C. § 403	5,16
National Environmental Policy Act ("NEPA")	
42 U.S.C. § 4332	<i>passim</i>
Federal Land Policy Management Act ("FLPMA")	
43 U.S.C. §§ 1701 <i>et seq</i>	17
Regulations	
Army Corps of Engineers	
22 C.F.R. § 330.1	6
33 C.F.R. § 330.5(a)(3)	5,13
33 C.F.R. § 330.5(a)(4)	14
33 C.F.R. § 330.5(a)(11)	14
33 C.F.R. § 330.5(a)(15)	15
33 C.F.R. § 330.5(a)(21)	15
33 C.F.R. § 330.5(a)(22)	15
33 C.F.R. § 330.5(d)	6
National Park Service	
36 C.F.R. § 65.2(a)	3
Advisory Council on Historic Preservation	
36 C.F.R. § 800.1(c)	4
36 C.F.R. § 800.2(o)	9,14
36 C.F.R. § 800.3(c)	4
36 C.F.R. § 800.5	4,13
36 C.F.R. § 800.6	13
36 C.F.R. § 800.9	13
Council on Environmental Quality	
40 C.F.R. § 1501.4(a)(2)	12
40 C.F.R. § 1507.3(b)(2)(ii)	12
40 C.F.R. § 1508.4	12

Table of Authorities Continued

	Page
Interstate Commerce Commission	
49 C.F.R. § 1152	16
Federal Communications Commission	
50 Fed. Reg. 23,417 (June 4, 1985)	16
Legislative History	
National Historic Preservation Act, 1980	
Amendments	
H.R. Rep. No. 1457, 96th Cong., 2d Sess. 45, <i>reprinted in</i> 1980 U.S. Code Cong. & Admin. News 6378, 6408	10
Other	
Advisory Council on Historic Preservation, Re- port to the President and Congress of the United States (1988)	13



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-563

VIEUX CARRE PROPERTY OWNERS, RESIDENTS &
ASSOCIATES, INC.,

Petitioner,

v.

COLONEL LLOYD KENT BROWN, *et al.*,

Respondents.

AMICUS BRIEF OF THE NATIONAL TRUST FOR
HISTORIC PRESERVATION IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI

This brief is submitted by the National Trust for Historic Preservation in the United States as *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, in support of the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Consent to appear as *amicus* has been obtained from the United States and from the petitioner, Vieux Carré Property Owners, Residents & Associates, Inc., as evidenced by letters filed with the Clerk of this Court.¹

¹ The National Trust for Historic Preservation also participated as *amicus curiae* before the Fifth Circuit below.

INTEREST OF AMICUS CURIAE

The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 as a private, nonprofit organization, to promote public involvement in the protection of America's historic resources and to further the historic preservation policy of the United States. *See* 16 U.S.C. § 468, 461-467. The National Trust currently has more than 225,000 individual and 3000 organizational members nationwide. The National Trust's Chairman is by statute a member of the Advisory Council on Historic Preservation, an independent federal agency, which is responsible for implementing the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and for commenting on federal undertakings affecting historic resources. *See id.* §§ 470i(a)(8), 470s, 470f. The Advisory Council's duties also include reviewing the policies and programs of other federal agencies to ensure consistency with the historic preservation policies adopted by Congress. *See id.* §§ 470, 470j.

STATEMENT

This case presents substantial questions regarding whether federal agencies can unilaterally exempt themselves from mandatory environmental review statutes such as the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*, by adopting abbreviated regulatory procedures for authorizing projects requiring federal approval and supervision. The Fifth Circuit's decision not only allows such a result, contrary to the plain statutory language of the NHPA, but also undermines enforcement by refusing to allow joinder of non-federal defendants conducting an environmentally harmful project pursuant to a fed-

eral permit. In reaching this conclusion, the Fifth Circuit not only disregarded the well-reasoned decisions of other circuits but also misconstrued this Court's decision in *California v. Sierra Club*, 451 U.S. 287 (1981). Review by this Court is necessary to resolve a split in the circuits and to halt judicial erosion of the statutory scheme created by Congress for the protection of historic properties.

The Vieux Carré (also known as the French Quarter), is the original section of New Orleans, Louisiana, first laid out in 1721. The district, which has remained substantially intact, includes a unique mixture of distinctive 18th and 19th Century architectural styles, and is listed in the National Register of Historic Places. The Vieux Carré has also been designated as a National Historic Landmark District, a classification reserved for "properties of exceptional [historic] value to the nation as a whole." 36 C.F.R. § 65.2(a) (1987); *see* 16 U.S.C. § 470a(a). As a result of the district's historic status, federal agencies are required to comply with Section 106 of the NHPA prior to licensing, permitting, or funding any project that may affect the Vieux Carré's historic and architectural character. 16 U.S.C. § 470f. Because of the Vieux Carré's status as a National Historic Landmark, federal agencies are also required, under Section 110(f) of the NHPA, to minimize "to the maximum extent possible" the adverse effects of their proposed projects on the Vieux Carré. *Id.* § 470h-2(f).

The National Historic Preservation Act was enacted by Congress in 1966 to implement a broad national policy of encouraging the preservation and protection of America's historic and cultural resources. *Id.* §§ 470, 470-1. In order to promote this policy, Section

106 of the NHPA prohibits federal agencies from conducting or approving any federal "undertaking" (including any federally assisted or licensed undertaking), unless the agency, in consultation with the State Historic Preservation Officer ("SHPO"),² (1) takes into account the effects of the undertaking on historic properties that are listed or eligible for listing in the National Register of Historic Places; and (2) affords the Advisory Council on Historic Preservation, an independent federal agency, a reasonable opportunity to comment on the undertaking. *Id.* § 470f.³ If the impact on historic properties is adverse, the federal agency must then consider ways in which the adverse impact can be avoided or mitigated. 36 C.F.R. § 800.5(e).

The instant lawsuit arose out of the refusal of the U.S. Army Corps of Engineers to comply with Sections 106 and 110(f) of the NHPA when it permitted four local and state government entities (the non-federal defendants below)⁴ to begin construction of a new waterfront aquarium and park (the "Aquarium

² The SHPO is the official in each state responsible for assisting federal agencies in carrying out their historic preservation responsibilities, 16 U.S.C. § 470(b), and is a "key participant" in the Section 106 consultation process, 36 C.F.R. § 800.1(c)(1)(ii).

³ This review and consultation process, which is set out more fully in the regulations issued by the Advisory Council on Historic Preservation, 36 C.F.R. Part 800, must be completed as early as possible in the decisionmaking process, and in any event prior to federal approval, licensing, or funding of the project. *Id.* § 800.3(c).

⁴ The non-federal defendants were the City of New Orleans, the Audubon Park Commission, the Board of Commissioners of the Port of New Orleans, and the Board of Commissioners of the Orleans Levee District.

Project") on and adjacent to the Bienville Street Wharf, which is located entirely within the Vieux Carré National Historic Landmark District. The aquarium building itself will be a massive ultra-modern structure, which has been determined by the Louisiana SHPO to be wholly inconsistent in both scale and appearance with the historic character of the Vieux Carré.⁵

Because the Bienville Street Wharf, on which part of the Aquarium Project is to be constructed, extends into the Mississippi River, the wharf is subject to the jurisdiction of the U.S. Army Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 403. As a result, no construction can take place on the wharf without a permit from the U.S. Army Corps of Engineers. In this instance, the Army Corps' authorization of the Aquarium Project was issued in the form of a "nationwide," rather than an individual permit, which allows the "repair, rehabilitation, or replacement" of structures previously authorized by a Corps permit, 33 C.F.R. § 330.5(a)(3), since the original Bienville Street Wharf was constructed pursuant to an Army Corps permit issued in the 1930's.

The nationwide permit program is a creation of administrative convenience by the Army Corps, de-

⁵ The Louisiana SHPO also expressed "grave concern" about the adverse effects on the Vieux Carré caused by the "longterm traffic congestion, pollution, noise and vibration" that will result from the Aquarium Project. The Army Corps is required under Section 106 to consider these direct and indirect effects of the Aquarium on the Vieux Carré historic district. See *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985).

signed to allow certain activities that would otherwise require an individual permit "to occur with little, if any, delay or paperwork." *Id.* § 330.1. Nationwide permits for repair or rehabilitation are automatic, in that no formal application is needed in order to proceed with activities falling within their scope. Nonetheless, nationwide permits are subject to revocation or modification by the Corps. *Id.* § 330.5(d).

When it became apparent that the Army Corps intended to allow the non-federal defendants to proceed with the Aquarium Project without complying with either Section 106 or Section 110(f), the petitioner Vieux Carré Property Owners, Residents & Associates, Inc. (plaintiff below), filed a complaint for declaratory relief against the Army Corps, and for injunctive relief against the non-federal defendants seeking to restrain construction of the Aquarium Project pending compliance with the NHPA. The district court denied plaintiff's request for injunctive relief, on the ground that plaintiff had no right of action against any of the non-federal defendants, and also dismissed plaintiff's claims that the Army Corps was required to comply with the NHPA.

On appeal, the Fifth Circuit reversed the district court's ruling that the Army Corps was not required to comply with Section 106 prior to authorizing the Aquarium Project under its nationwide permit program, on the grounds that a nationwide permit is a "license" within the meaning of Section 106. 875 F.2d at 465. However, notwithstanding what the court conceded to be the literal statutory language of Section 106, the court held that nationwide permits authorizing "inconsequential activities" would be deemed exempt from Section 106. The court remanded the case

to the district court "to determine whether the [Aquarium] project is so inconsequential that it nevertheless escapes the historic review requirements of the NHPA section 470f."⁶ 875 F.2d at 466.

The Fifth Circuit affirmed the district court's dismissal of the non-federal defendants,⁷ despite contrary precedent in the Ninth and Tenth Circuits requiring joinder of non-federal parties whose environmentally harmful actions were alleged to be improperly authorized by federal agencies and threatened to cause irreparable injury. *Id.* at 456-58. As a result, the petitioner has been prevented from securing any preliminary injunctive relief to preserve the status quo while the district court reviews the question of whether Section 106 applies to the nationwide permit at issue here.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision Creates a Conflict Among the Circuits as to Whether Federal Agencies May Exempt Themselves From Compliance with Mandatory Environmental Review Statutes

The Fifth Circuit has ruled that the Army Corps is not required to comply with Section 106 whenever the Corps unilaterally pre-determines that a project will be "inconsequential"—regardless of whether the

⁶ Trial in the district court on this issue has been scheduled for January 24, 1990.

⁷ Hence, the Brief in "Opposition" to the petition for a writ of certiorari, filed with this Court on November 2, 1989 by the Audubon Park Commission and the City of New Orleans, is, at most, in the nature of an *amicus* brief, rather than the brief of a party.

environmental *effects* of the project will be “inconsequential”—and that compliance with Section 106 for such “inconsequential” projects may interfere with the Corps’ asserted need for administrative convenience. 875 F.2d at 463-66. While the court admitted that such an exemption was precluded by the plain statutory language of Section 106, it reasoned that a rewriting of the statute was necessary to prevent “absurd” results. *Id.* at 465.

The Fifth Circuit’s ruling is in direct conflict with the Tenth Circuit regarding whether agencies, in the name of regulatory efficiency and convenience, may unilaterally exempt themselves from compliance with mandatory environmental review statutes that, by their terms, do not permit exceptions even for “minor” agency actions. See *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985). Moreover, the Fifth Circuit was simply wrong in asserting that the review and consultation process of Section 106 would lead to “absurd” results. The Section 106 process, as interpreted by the regulations of the Advisory Council on Historic Preservation, is an inherently reasonable and efficient one, which provides objective, uniform standards and procedures by which agencies can assess the effects of their actions on historic properties, in consultation with the agency experts on assessing such effects—the State Historic Preservation Officer and the Advisory Council on Historic Preservation.

In contrast, the exemption for “inconsequential” projects devised by the Fifth Circuit would produce the truly “absurd” result of displacing an efficient and well-crafted regulatory scheme whenever an agency decides to exempt itself from the requirements

of Section 106 by unilaterally determining its actions to be "truly inconsequential"—a standard so devoid of guidance as to be virtually unreviewable. In other words, the Fifth Circuit has created an exemption that may well swallow the whole statute. Accordingly, Supreme Court review is needed to clarify agency responsibilities under the NHPA, and prevent the strong mandate of Section 106 from being eroded through the use of regulatory procedures that place administrative convenience ahead of congressionally mandated environmental review.

A. Section 106 Applies to All Agency Authorized Activities, No Matter How "Inconsequential," Which Could Result in Changes to the Character or Use of Historic Properties.

The Fifth Circuit's ruling creates a threshold exemption from the NHPA for federally-authorized actions that are "truly inconsequential" in relation to the agency's overall goals—i.e., inconsequential in their effect on navigable waters. However, the plain statutory language of Section 106 requires agencies to "take into account the effect" of their undertakings on historic properties prior to the issuance of "any license."⁸ 16 U.S.C. § 470f (emphasis added). This statutory language demonstrates, on its face, that Congress did not intend to allow agencies to

⁸ The Fifth Circuit's opinion is even more directly at odds with the statutory language in concluding that Section 110(f) of the NHPA, 16 U.S.C. § 470h-2(f), which specifically protects National Historic Landmarks, is "inapplicable" to *all* federal licensing and permitting activities. 875 F.2d at 463-64 n.6. By its explicit terms, Section 110(f) applies to "any Federal undertaking," which is defined by the Advisory Council's regulations to include the issuance of any federal license or permit. See 36 C.F.R. § 800.2(o).

adopt categorical exemptions from Section 106 for certain activities that the agency has unilaterally pre-determined to be "inconsequential."⁹

The Fifth Circuit's creation of an exemption for "inconsequential" activities is squarely in conflict with the holding of the Tenth Circuit in *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985), that the Army Corps must undertake the environmental review mandated by the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, with respect to actions authorized by the Corps' nationwide permit program. The ESA, like the NHPA, requires all agencies to undertake an environmental review in connection with "any permit" issued by an agency. *Id.* § 1536(a)(3). In construing this statutory language, the Tenth Circuit noted specifically that the ESA was triggered not only by "major federal actions," but by "any permit," and unequivocally interpreted this language as requiring the Corps to

⁹ Contrary to the Fifth Circuit's assumption, the legislative history of the NHPA in no way supports an exemption from the NHPA for "inconsequential" activities. Rather, the passage from the legislative history of the 1980 amendments to the NHPA, cited by the court, 875 F.2d at 465 (citing H.R. Rep. No. 1457, 96th Cong., 2d Sess. 45, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6378, 6408), suggests only that the degree of federal involvement may affect the breadth of avoidance and mitigation measures that the agency must consider in its Section 106 review; it does not affect whether Section 106 applies in the first instance. Congress made it clear that even in the case of mere "technical assistance" from an agency to a privately funded project, the agency is expected to "take into account" the effects on historic properties, as required by Section 106. *Id.* Thus, no implied exemptions from the statute could reasonably be construed from this legislative history.

consider the environmental impact of each act that it authorizes, *both major and minor*. In creating categories of nationwide permits, the Corps has "acted" to authorize discharges. *Thus, simply allowing a party to proceed under the nationwide permit is an action by the Corps triggering its obligation to consider environmental impacts.*

Riverside Irrigation District v. Andrews, 758 F.2d 508, 513 (10th Cir. 1985) (emphasis added).¹⁰ In other words, if the activity is "consequential" enough to come within the Army Corps' statutory permitting jurisdiction under the RHA, it is "consequential" enough to require compliance with federal environmental review laws.

Because the Fifth Circuit's ruling is in direct conflict with that of the Tenth Circuit, this Court's review is needed to resolve this split in the circuits.

B. The Exception Created by the Fifth Circuit Is Not Necessary to Prevent "Absurd" Results, and Is Contrary to Established Principles of Administrative Procedure.

The regulations implementing Section 106, which are binding on the Army Corps,¹¹ do not permit an

¹⁰ The Fifth Circuit's reliance on *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), to distinguish *Andrews* only adds to the confusion. That case suggested that the threshold requirements for Section 106 and NEPA were identical. *Id.* at 1309. Other courts have recognized, however—as the statutory language makes clear—that Section 106 and NEPA have different jurisdictional thresholds. *See, e.g., Aertson v. Landrieu*, 488 F. Supp. 314, 322 (D. Mass.), *aff'd*, 637 F.2d 12 (1st Cir. 1980) (HUD had adequately complied with Section 106 in funding a housing project, but the housing project was not a "major federal action" under NEPA).

¹¹ The Advisory Council has the exclusive authority to deter-

agency to adopt "categorical exclusions" for actions that would not significantly affect the environment, in contrast to the regulations of the Council on Environmental Quality ("CEQ"), implementing NEPA.¹² Nonetheless, the Fifth Circuit has judicially created such a categorical exemption for activities authorized by Army Corps nationwide permits that are "inconsequential." Not only will such a categorical exemption fundamentally disrupt the regulatory scheme established by Section 106, but it is so devoid of regulatory standards or guidance so as to render the Army Corps' actions essentially unreviewable. At a minimum, this vague exception will invite undesirable litigation over its scope and application.

The regulations of the Advisory Council on Historic Preservation outline an informal consultation process for complying with Section 106 that is flexible, balanced, and remarkably efficient. Under the Advisory Council's regulations, even if the agency believes at the outset that its action will have no effect on historic properties, the regulations require the State Historic Preservation Officer ("SHPO") and the Advisory Council—the agencies with historic preservation expertise—to concur in that determination, and the regulations establish objective standards and procedures

mine the procedures for compliance with Section 106. See *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980). The regulations of the Advisory Council "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. 16 U.S.C. § 470s; see *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

¹² See 40 C.F.R. §§ 1501.4(a)(2), 1507.3(b)(2)(ii), 1508.4.

for making the required assessment of adverse effects.¹³ 36 C.F.R. §§ 800.5, 800.9. The process is also governed by timetables that prevent burdensome delays. *See id.* §§ 800.6(a)(1)(iii), (a)(2), (b)(1).

The Fifth Circuit's judicial exemption disrupts this regulatory scheme in several ways. First, the exemption will permit agencies to make advance, categorical determinations of "no adverse effect," without any awareness of what historic resources could be affected by a project, or what the effects of the project would be on those resources, and without consulting with the expert agencies. Moreover, the court's exemption will allow agencies to devise their own criteria for determining that a project is so "inconsequential" that it should be exempt from Section 106. For example, the criteria employed by the Army Corps for exempting nationwide permits from Section 106 relate to the project's "inconsequential" effect on navigable waters, and not its effect on historic properties. *See* 33 C.F.R. § 330.5(a)(3).¹⁴

The categorical exemption devised by the Fifth Circuit is not only disruptive of the statutory scheme,

¹³ This process is so effective in screening out projects that will avoid harm to historic properties that the Advisory Council issues at least 1200 determinations of "no adverse effect" each year, *see* 36 C.F.R. § 800.5(b), (d), and the SHPOs together process nearly 90,000 such approvals annually. *See* Advisory Council on Historic Preservation, Report to the President and Congress of the United States 42 (1988).

¹⁴ The Aquarium Project, which the Army Corps would categorically exempt as being "truly inconsequential," is exactly the kind of project that *should* be subject to Section 106. While its impact on navigation may be minor, the SHPO has expressly determined that it will have significant adverse impacts on the surrounding historic district.

but it is unnecessarily so. The existing regulatory process already ensures that projects or activities which are "truly inconsequential" because they truly have no potential to affect historic properties need not be subject to the consultation and review process of Section 106. *See* 36 C.F.R. § 800.2(o) (Section 106 applies only to activities that by their nature "*can* result in changes in the character or use of historic properties"). Thus, activities such as the funding of a school lunch program or, in the case of the Army Corps, issuance of a nationwide permit authorizing the placement of temporary buoys or crab and lobster traps, 33 C.F.R. § 330.5(a)(4), (11), would not be subject to Section 106 under the current regulatory scheme, because historic properties could not even potentially be affected by such activities.

The exemption for "inconsequential" projects created by the Fifth Circuit will itself lead to "absurd" results, which stand established principles of administrative procedure on their head. Even if agencies were permitted to create categorical exemptions from Section 106, they would be obligated to do so consistent with the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553. This includes promulgating a regulation based on an explicit justification in the administrative record to ensure that the conclusions are the rational result of reasoned analysis and are amenable to judicial review.¹⁵ In order for an agency to apply such a cat-

¹⁵ *American Maritime Ass'n v. United States*, 766 F.2d 545, 566 n.30 (D.C. Cir. 1985). Moreover, there must be a rational connection between the facts in the record and the inferences created. *NLRB v. Baptist Hospital*, 442 U.S. 773, 787 (1979); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-05 (1945);

egorical exemption it must first provide a reasoned explanation.¹⁶ Here, the Army Corps has not even endeavored to comply with the barest formalities for assembling facts that would support such a categorical exemption.

The potential impact of the Fifth Circuit's ruling is by no means limited to the nationwide permit at issue in this case. The Corps has promulgated 26 different categories of nationwide permits, most of which have the potential for authorizing actions that can potentially harm historic properties.¹⁷ With respect to all such activities, the court has potentially relieved the Corps of its statutory obligation under Section 106 to identify historic properties that could be affected by such activities, and to consider ways in which any adverse effect on historic properties can be avoided or mitigated.

NLRB v. Beth Israel Hospital, 437 U.S. 483, 501 (1978); *National Tourbrokers Ass'n v. ICC*, 671 F.2d 528, 532-33 (D.C. Cir. 1982).

¹⁶ See *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986) (quoting *Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985); *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 741 (3d Cir. 1982)) (an "agency cannot . . . avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.").

¹⁷ See, e.g., 33 C.F.R. § 330.5(a)(15) (discharges of dredged or fill material incidental to the construction of bridges across navigable waters, including coffer-dams, abutments, foundation seals, piers, and temporary construction and access fills); *id.* § 330.5(a)(21) (structures, work, or discharges associated with surface coal mining—which may disrupt archeological sites); *id.* § 330.5(a)(22) (removal of wrecked, abandoned, or disabled vessels—which may themselves have historic or archeological value).

Moreover, the Fifth Circuit's endorsement of such an exemption creates the potential for significant erosion of compliance with Section 106 by other federal agencies that have also enacted abbreviated permitting procedures for areas of regulatory responsibility which, in their view, require a lesser degree of supervision and control.¹⁸ The Fifth Circuit's decision will allow these agencies to use "administrative convenience" as an excuse for evading their congressionally mandated environmental review responsibilities. This Court's review is necessary in order to correct the Fifth Circuit's error.

II. The Decision Below Precluding Joinder of Non-Federal Defendants Acting Pursuant to a Federal Permit Creates a Split in the Circuits That Undermines the Enforcement Mechanism Designed by Congress to Protect Historic Properties.

A. The Fifth Circuit's Dismissal of the Non-federal Defendants Was Wrong, and Conflicts with the Decisions of the Ninth and Tenth Circuits.

The Fifth Circuit also held that the district court lacked jurisdiction to join the non-federal defendants, who were authorized by an Army Corps nationwide permit under Section 10 of the Rivers and Harbors Act ("RHA"), 33 U.S.C. § 403, to go forward with a project that will have an adverse effect on the Vieux

¹⁸ See, e.g., *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663 (9th Cir. 1989), petition for cert. filed sub nom. *Tuolumne Park & Recreation Dist. v. ICC*, 58 U.S.L.W. 3336 (U.S. Oct. 30, 1989) (No. 89-701) (re ICC "exempt" abandonment procedures, 49 C.F.R. § 1152); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989), petition for cert. filed, 58 U.S.L.W. ____ (U.S. Dec. 6, 1989) (No. 89-898) (re FCC "one-step" licensing procedures, 50 Fed. Reg. 23,417 (June 4, 1985)).

Carré Historic District, notwithstanding the Army Corps' failure to comply with the NHPA. The Fifth Circuit's decision rejects the well-reasoned opinions of two other circuits, one holding that joinder of non-federal defendants was appropriate under Rule 20 of the Federal Rules of Civil Procedure, and the other holding that joinder was required by Rule 19(a), under circumstances similar to those here. See *Sierra Club v. Hodel*, 848 F.2d 1068, 1076 (10th Cir. 1988); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914 (9th Cir. 1977). This Court's review of the Fifth Circuit's decision is necessary in order to resolve this conflict among the circuits and provide consistent guidance on this critical jurisdictional issue.

In *Hodel* and *Tahoe*, the Tenth and Ninth Circuits used a joinder analysis under the Federal Rules of Civil Procedure to conclude that non-federal entities proceeding with environmentally harmful projects subject to a federal permit or approval could be enjoined pending judicial review as to whether the permit or approval was lawfully issued.¹⁹ In both *Tahoe* and *Hodel*, the courts concluded that joinder of the non-federal permittees was appropriate, despite the absence of a direct cause of action against them, since

¹⁹ In *Hodel*, the court enjoined a local county from widening a road through federal Wilderness Study Areas on the ground that the Bureau of Land Management ("BLM"), which was required to approve the project under the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, had failed to comply with NEPA. In *Tahoe*, the court enjoined construction of several private developments, based on a regional planning agency's unlawful approval of the projects, in violation of an interstate compact.

without joinder, the non-federal defendants “could defeat the objectives sought in the suit against the agency.” *Hodel*, 848 F.2d at 1077; *see Tahoe*, 558 F.2d at 917 (“the actual harm sought to be prevented . . . would have already occurred, thereby denying [plaintiffs] their requested relief even if they are successful [on the merits]”). Under the analysis of both the Ninth and the Tenth Circuits, the primary emphasis is on affording complete relief to the plaintiff.

Although the circumstances of this case are factually similar to those in *Tahoe* and *Hodel*, the Fifth Circuit nonetheless rejected the joinder analysis of the Tenth and Ninth Circuits, holding instead that the plaintiff was required to have a direct cause of action against the non-federal defendants in order to join them. 875 F.2d at 456-58. In doing so, the Fifth Circuit relied almost exclusively on this Court’s decision in *California v. Sierra Club*, 451 U.S. 287 (1981)—clearly inapposite here—which holds simply that Section 10 of the Rivers and Harbors Act creates no implied private right of action. *See* 875 F.2d at 456.

The Fifth Circuit, while purporting to limit its ruling solely to the issuance of RHA permits by the Army Corps of Engineers, has distorted this Court’s ruling in *California v. Sierra Club* into a broad taboo that not only would preclude claims under an entirely different statute—Section 106 of the NHPA—but also would preclude claims against a specific type of defendant—a non-federal permittee of a federal agency. As a result, the court’s ruling below has created tremendous confusion.²⁰ This Court’s review is

²⁰ The potential chaos created by the court’s analysis below is

essential to correct the Fifth Circuit's erroneous holding that *California v. Sierra Club*, 451 U.S. 287 (1981), would bar the joinder of non-federal permittees under a non-RHA claim, especially where such joinder is necessary to enforce Congress' mandate under Section 106.

B. Joinder of the Non-federal Permittees Is Necessary in Order to Afford Complete Relief to Plaintiffs.

Like the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, Section 106 by its terms places obligations only on federal agencies. 16 U.S.C. § 470f. Nonetheless, the Fifth Circuit's holding that federal courts are powerless to halt non-federal permittees from carrying out activities that may destroy historic properties, even when those activities have been federally authorized in violation of Section 106, is inconsistent with the language and policies of the NHPA and with the decisions of other circuits.

Section 106 of the NHPA was intended to ensure that federally licensed activities such as the Aquarium Project would not commence until after the licensing

illustrated by a subsequent Fifth Circuit decision in which the court—without explanation—extended the *Vieux Carré* holding precluding jurisdiction over non-federal defendants to apply to all federal agencies. See *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989) (non-federal defendants and license applicants dismissed in case involving FCC violation of Section 106), *petition for cert. filed*, 58 U.S.L.W. ____ (U.S. Dec. 6, 1989) (No. 89-898). In doing so, the court completely disregarded its original rationale limiting the judicial insulation of non-federal defendants to cases involving the Army Corps, based on *California v. Sierra Club*, and thus further eroded Congress's intent to protect historic properties.

agency has completed its consideration of the project's impacts on historic properties. To ensure compliance, and to provide a specific enforcement mechanism for the public, Congress amended the NHPA in 1980 to confirm explicitly the availability of a private right of action, which authorizes a "civil action brought in any United States district court by any interested person to enforce the provisions of [the NHPA]." 16 U.S.C. § 470w-4.

If left undisturbed, the Fifth Circuit's decision will cripple this private enforcement authority because courts will be powerless to enjoin federally permitted activities that may violate Section 106. The result of the Fifth Circuit's view is that a non-federal party may act on an unlawfully granted license with impunity, regardless of the potential damage to historic resources. This interpretation is contrary to what Congress intended when it amended the NHPA to bestow private enforcement authority.²¹ Review of this issue is therefore necessary in order to afford complete relief to the plaintiff.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari and should reverse the decision of the Fifth Circuit.

²¹ See *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985); *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784 (S.D. Ohio 1982).

Respectfully submitted,

DAVID A. DOHENY
General Counsel

ELIZABETH S. MERRITT
(*Counsel of Record*)

ANDREA C. FERSTER
Assistant General Counsel
National Trust for
Historic Preservation

1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 673-4035

Counsel for Amicus Curiae

December 9, 1989